Wm. Bradley

A

TREATISE

ON THE

PRINCIPLES AND PRACTICE

OF THE

ACTION OF EJECTMENT,

AND THE

RESULTING ACTION FOR MESNE PROFITS.

BY JOHN ADAMS,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

From the last London Edition.

TO WHICH HAVE BEEN CAREFULLY NOTED,

THE DECISIONS OF THE SUPREME COURT OF NEW-YORK,

From January Term, 1799, *to October Term*, 1820.

WITH REFERENCES TO DECISIONS IN THE COURTS OF MASSACHUSETTS AND PENNSYLVANIA, AND THE SUPREME COURT OF THE UNITED STATES.

BY PHILO RUGGLES, ESQ.
COUNSELLOR AT LAW.

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1821.

TO

THE RIGHT HONOURABLE

EDWARD LORD ELLENBOROUGH,

LORD CHIEF JUSTICE OF ENGLAND,

&c. &c. &c.

THIS TREATISE

IS,

WITH HIS LORDSHIP'S KIND PERMISSION,

MOST RESPECTFULLY INSCRIBED

BY HIS OBLIGED AND OBEDIENT SERVANT,

THE AUTHOR.

ADVERTISEMENT

TO THE

SECOND EDITION.

IN the present Edition the Author has corrected some errors, and supplied some defects, which remained undiscovered until after the original publication of the Treatise; and has, also, added some new matter, which he trusts will render the Work more complete. The Chapters on Evidence, and on the Action as between Landlord and Tenant, have been enlarged; and, in the practical part of the Work, several manuscript cases have been introduced. An alteration has also been adopted in the arrangement of the Chapters; and at the suggestion of several professional friends, and by the kind permission of Mr. Tidd, those practical forms, to which the Author referred in the Preface to the first edition, form an Appendix to the present volume.

10, Crown Office-row, Temple,

May 1, 1818.

PREFACE

TO

THE FIRST EDITION.

IT has been the Author's chief endeavour, in the following pages, to investigate the principles upon which the remedy by Ejectment is founded; to point out concisely the different changes which the action has undergone; and to give a full and useful detail of the practical proceedings by which it is, at this time, conducted. To this end the later decisions have been very fully considered; whilst a slight mention only has been made of the more ancient cases, now, for the most part, indirectly overruled, or altogether inapplicable to the modern practice.

Before the time of Lord MANSFIELD, indeed, no regular system seems to have been formed for the government of the action; and that illustrious judge, considering an Ejectment as a fiction invented for the purposes of individual justice, endeavoured to mould

it into an equitable remedy, and to regulate it by maxims, in some degree independent of the general rules of law, as well as of the practice in other actions. The erroneous principles on which this system was founded, were pointed out by the late Lord KENYON; and a material alteration, in the mode of conducting the action, took place from the time of his Lordship's elevation to the Bench. By his sound and luminous decisions, the remedy has been placed upon its true principles; and he lived to see a system nearly completed, which, uniting the equitable fictions of the particular action with the general principles of law, has preserved unbroken the great boundaries of our legal jurisprudence, and, at the same time, rendered the remedy most useful and comprehensive. The correct principles established by this great lawyer still prevail, having been uniformly maintained, and ably illustrated, by the more recent decisions of the different courts.

The Author has enlarged upon these circumstances, in order to account for the personal judgment he has, in some instances, found it necessary to exercise with regard to decisions anterior to the time of Lord KENYON; many cases being still extant as authorities,

which seem wholly inconsistent with the modern principles of the action of ejectment.

The application of the remedy, as between landlord and tenant, forms also a material part of this treatise; and it has there been the Author's endeavour to give some useful practical directions respecting *notices to quit*, and the manner of proceeding on the forfeiture of a lease, at the same time explaining the principles upon which those directions are founded.

The evidence necessary to support and defend the action in common cases has also been considered; and instructions for proceeding according to the ancient practice have been added, as far as can be necessary at the present time.

For practical forms in ejectment, the Reader is referred to those contained in Mr. TIDD'S Appendix to his Practice of the Court of King's Bench: a collection, which appears to the Author, too complete to require addition, and too accurate to be susceptible of improvement.

5, SERJEANTS' INN,
May 1, 1812.

PREFACE

TO

THE AMERICAN EDITION.

As no branch of jurisprudence is more important than that portion of it by which real estate is governed; so no legal remedy should be more clearly understood, than that by which the title to landed property is judicially determined. This remedy is found in the modern action of Ejectment, the essential features of which, as established by the British tribunals, have been adopted by the Courts of New-York, with less variation than in any other state in the Union. There being no work upon the subject exclusively American, a well written English treatise has, therefore, become indispensable. As a summary of the principles and practice that regulate the British courts, the English edition of the present work will unquestionably be found of great value; and for conciseness and perspicuity it appears, upon a comparison with the latest and most approved edition of Mr. Runnington's treatise, to merit a decided preference. Still the work to the American practitioner, is incomplete, without a reference to our own adjudged cases, and the rules established in our own courts. The Reports of the Supreme Court of the State of

New-York have been enriched, during the last twenty years, by the learning and talents of distinguished jurists, by whose labours the English system of law has been ably illustrated and adapted to the policy and genius of our government and institutions. The volumes containing their valuable decisions are, however, so numerous, that a ready reference to them (and especially at circuits) has become impossible. To remedy this inconvenience, as far as relates to the law of Ejectment, the present notes have been added, in compiling which, reference has also been had to the decisions of the Supreme Courts of Massachusetts, Pennsylvania, and the United States. The reports have been examined with care and attention, and the principles which they contain have been arranged in the order laid down in the text, and in a manner calculated to render a reference to the original decisions easy and convenient. The object of the compilation will be fully attained, and the Editor will feel himself amply repaid, if by the notes to this treatise the labours of the practitioner are lightened, and the researches of the student facilitated.

March 15*th*, 1821.

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ERRATA.

Page 47, *in notes*, line 23, for "*Odgen*" read "*Ogden.*"
64, *in notes*, line 11, for "*Before*" read "*Under.*"
165, *in notes*, line 5, for "*lessor's consent*" read "*first offering to lessor the right of pre-emption.*"
189, *in notes*, line 17, for "*Allen*" read "*Alen.*"

A

TREATISE

ON THE

ACTION OF EJECTMENT.

CHAPTER I.

OF THE ORIGIN—PROGRESS—AND NATURE OF THE ACTION OF EJECTMENT.

THE action of ejectment is a fictitious mode of legal proceeding, by which possessory titles to corporeal hereditaments and tithes, may be tried, and possession obtained, without the process of a real action.

The alterations which from time to time have taken place, in the nature and uses of the action of ejectment, form a remarkable and important branch of the changes effected in our general system of remedial law. From being a mere action of trespass to recover the damages sustained by a lessee for years, when ousted of his possession, it has gradually usurped the place of all the ancient remedies for the recovery of possessory rights to real property, and is at the present time the universal mode of trying possessory titles. The alterations have, however, been effected by the most simple and natural means; and in tracing the remedy through its several gradations, it will be found continually moulding itself to the condition of the

times, and extending its uses and powers, as the progress of civil society rendered necessary or convenient.

In the earlier periods of our history, estates for years, according to their present import, were unknown. Under the feudal system, war was the primary object even of legislation; and it is therefore by no means surprising that the interests of the inferior tenantry were in those times disregarded, and that the remedies for the recovery of lands were altogether confined to freehold titles, vested in the superior landholders.

The lords, indeed, seldom permitted their vassals to enjoy any interest in the lands they occupied, which could render them independent of their will; and, even when they did grant them a right to the possession for a determinate period, as a stimulus to increase their industry, such grants were not considered as transferring to the grantee any title to the land, but merely as agreements or contracts between the lord and his vassal.

The old writ of covenant, adapted at that time to the recovery of the term, as well as of damages, was the only remedy to which the tenants were entitled upon these leases. But this writ could only extend to cases in which there was a breach of the original contract, and the tenant was therefore altogether without means of redress, when dispossessed of his land by the act of a stranger, not claiming under the grantor. Great difficulties also attended the proceedings upon the writ of covenant. It only lay between the immediate parties to the grant; and, as it frequently happened that the tenant was dispossessed by a person claiming under a subsequent feoffment from his grantor, and not by the grantor himself, he was then, notwithstand-

ing the breach of the original contract, enabled to recover only damages for the injury he had sustained, but had no means of regaining possession of the land from which he had been ousted.(*a*)

So regardless, however, was the law during the first ages after the Conquest, of grants of this nature, that until the time of King *Henry* III. this writ of covenant remained the sole remedy for the grantee, even upon a breach of the grant. In that reign the first symptoms of a more enlightened policy appeared; and by the wisdom of the court and council, a full remedy was provided for a termor, who was dispossessed of his land, against all persons whatsoever, claiming under the title of the grantor.(*a*)

The writ invented for this purpose was, according to *Bracton*,(*a*) called the writ of *quare ejecit infra terminum*, and required the defendant to shew, wherefore he deforced the plaintiff of certain lands, which *A.* had demised to him for a term then unexpired, within which term the said *A.* sold the lands to the defendant, by reason of which sale the defendant ejected the plaintiff therefrom.

The language, indeed, used by *Bracton*,(*a*) when speaking of this writ, may at first sight induce an opinion, that it was intended as a general remedy against all persons, even strangers, who ejected a lessee; and this interpretation has been adopted by a learned writer on the English law.(*b*) On a minute investigation, however, it will appear, that *Bracton* meant only to include the grantor himself, or persons claiming under him. One passage certainly militates against this conclusion, "*Si autem alius quàm qui tradidit ejecerit, si hoc fecerit cum* AUTORITATE *et* VOLUNTATE *tra-*

(*a*) Bracton, b. 4. f. 220. (*b*) Reeves Eng. Law, Vol. I. p. 341.

dentis, uterque tenetur hoc juditio, unus propter factum, et alius propter autoritatem. Si autem sine VOLUNTATE, *tunc tenetur ejector utrique, tam domino proprietatis, quam firmario: firmario per istud breve, domino proprietatis per assisam novæ disseysinæ, ut unus rehabeat terminum cum damnis, et alius liberum tenementum suum sine damnis.*" But the difficulty is removed by the next sentence, in which he says, "*Si autem dominus proprietatis tenementum ad firmam traditum alicui dederit in dominico tenendum, seysinam ei facere poterit* SALVO FIRMARIO TERMINO SUO." And it seems, therefore, that in the latter clause of the passage first above cited, particularly from the omission of the word *autoritate* in it, *Bracton* only alluded to cases where the grantor had enfeoffed another, without intending thereby to injure his grantee, and such feoffee afterwards entered upon him. This interpretation is also most consistent with the spirit of the times in which *Bracton* wrote. It was then held that a man could not enter *vi et armis* into his own freehold, and the writ of *quare ejecit infra terminum* is not a writ of trespass *vi et armis*, which, if it had lain against those not having a title to the freehold, it naturally would have been. The old authorities(*c*) also, when des-

(*c*) Thus, in Hil. Term, 3 Edward I. "In *quare ejecit* plaintiff shall recover his term and damages by him sustained by reason of the sale." (Stat. Ab. tit. *qua. ejec.*) In the Reg. Brev. (p. 227.) "*Fuit hoc breve inventum per discretum virum Whilhelmum de Merton ut terminarius recuperet catalla sua versus* FEOFFATUM." In a case in Hil. Term, 46 Edward III. 4. 12. *per Fulthorpe*, Justice. "If a stranger oust a lessee by reason of a *feoffment*, in that case he is put to his action upon the writ of *quare ejecit*;" and in the same case, *per Finchden*, J. "In such case, at the common law, the lessee had no other writ but his writ of covenant; and although by the law a special writ of *quare ejecit* is ordered against a stranger, *a feoffee*, nevertheless the lessee is not ousted of his writ of covenant against the lessor." This latter doctrine is exactly that laid down in Bracton. So, also, *per Choke*, J. (21 Edw. IV. 10. 30.) "*Quare ejecit*, &c. lieth where one is in by title, *ejectione firmæ* where one is *by wrong*;" and *per totam curiam* (19 Henry VI. 56. 19.) "If a man lease for years, and *sell to F.* who ousts the termor, the lessee shall have a *quare ejecit*, and recover his term and damages."

cribing the nature and effect of this writ, invariably speak of it, as lying in those cases only where the ejector claims title under the grantor. A sale of the lands to the ejector is also stated in the body of the writ. And, indeed, if the interpretation here contended for be incorrect, it seems quite unaccountable, that, more than half a century after the time of *Bracton*, a new writ, namely, the writ of *ejectione firmæ*, which only gave the plaintiff damages, and did not restore the term, should have been invented for lessees against strangers, when one so much more beneficial was already in existence.

The writ of *quare ejecit* might be drawn either as a *præcipe*, or a *si te fecerit securum*, and, when first invented, the *præcipe* was thought the better mode of proceeding, though in process of time, the latter became more generally used. It is, perhaps, from this circumstance that *Fitzherbert*(*d*) has considered the invention of the writ to be posterior to the statute of *Westminster* the second.(*e*)

The plaintiff, by this writ, as by the old writ of covenant, recovered both his term and damages, if the term were unexpired, or his damages only in case of its expira-

(*d*) The inaccuracy of Fitzherbert, when speaking of this writ, is remarkable. He considers its invention as posterior to the statute of Westminster 2. (13. Edw. I.) and as intended to remedy a partial evil, occasioned by the writ of *ejectione firmæ*. (F. N. B. 458.) Bracton, however, who wrote in the reign of Henry III. speaks of the writ as in use in his time, and as having been invented to remedy the inconveniences attendant on the old writ of covenant. In the Reg. Brev. (227.) also, the same reasons are given for its origin. The inaccuracy is evident also from another circumstance WALTER DE MERTON, called by Fitzherbert *William de Moreton*, and in the Reg. Brev. *William de Merton*, (the inventor of the writ,) was Chancellor in the reign of Henry III. (Dugdale's Chron.) and died in the sixth year of Edward I. (Matt. Westmon. p. 366.) seven years before the statute of Westminster 2. was enacted.

(*e*) F. N. B. 458.

tion before the judgment; but the great advantage he derived from it, was the power of proceeding against third persons, as well as against the original grantor.

Notwithstanding this favourable alteration, the farmer was still without remedy when dispossessed by a mere stranger, not claiming under his grantor. But an ouster by a stranger could then rarely happen; and if at any time the vassal was so dispossessed, he would throw himself on the protection of his lessor, abandon his own claim, and leave the lord to recover by a real action both the freehold and possession.

In process of time, however, the vassal demanded a remedy for himself, and in the reign of King *Edward* II. or in the early part of that of *Edward* III.(*f*) a writ was invented, which gave a lessee for years a remedy (though in some respects an imperfect one) against all persons whatsoever, who ousted him of his term; excepting, indeed, where the grantor himself ejected his lessee, and subsequently enfeoffed another, in which case, the old writ of *quare ejecit* was resorted to.

This new writ was a writ of trespass in its nature. The process upon it, as upon all other writs of trespass, was by attachment, distress, and process of outlawry. It called upon the defendant to show, wherefore, with force and arms, he entered upon certain lands which had been demised to the plaintiff for a term then unexpired, and ejected him from the possession thereof; and comprised all cases, with the single exception already mentioned, in

(*f*) The first recorded instance of an action of *ejectione firmæ*, is in the 44th year of Edward III. (Trin. 44 Edw. III. 22. 26.)

which the second lessee, coming into possession by means of a title, could not be said to be a trespasser. Even the grantor was liable to be sued upon this new writ, notwithstanding the old doctrine, that a man could not enter *vi et armis* into his own freehold.(*g*) As, however, the plaintiff did not possess a freehold interest, his title to the lands was only so far acknowledged in this action, as to give him damages for the injury he had sustained, but not to restore to him the possession of his term.

It is upon this writ, though apparently so dissimilar from the present practice, that the modern remedy by ejectment is founded.

Whilst the feudal system continued in its vigour, and estates for years retained their original character, but little inconvenience resulted to tenants from this imperfect remedy. When, however, the feudal policy declined, and agriculture became an object of legislative regard, the value and importance of estates of this nature considerably increased, and it was necessary to afford to lessees for years a more effectual protection. It then became the practice for leaseholders, when disturbed in their possessions, to apply to courts of equity for redress, and to prosecute suits against the lessor himself, to obtain a specific performance of the grant, or against strangers for perpetual injunctions to quiet the possession; and these courts would then compel a restitution of the land itself to the party immediately injured.(*h*)

The courts of common law soon afterwards adopted this method of rendering substantial justice: not indeed by the

(*g*) F. N. B. 505. (*h*) Gilb. Eject. p. 2.

invention of a new writ, which perhaps would have been the best and most prudent method, but by adapting the one already in existence to the circumstances of the times; and introducing, in the prosecution of a writ of ejectment, a species of remedy neither warranted by the original writ, nor demanded by the declaration, namely, a judgment to recover the term, and a writ of possession thereupon.

It is singular, that neither the causes which led to this important change, nor the principles upon which it was founded, are recorded in any of the legal authorities of those times. It is difficult, if not impossible, to ascertain with accuracy the precise period when the alteration itself took place; although it certainly must have been made between the years 1455 and 1499, since, in the former year, it is said by one of the judges,(*i*) that damages only can be recovered in ejectment; and an entry of a judgment is still extant, given in the latter of those years, that the plaintiff in ejectment shall recover both his damages and his term.(*k*) It is said, indeed, in argument as early as the year 1458, that the term may be recovered in ejectment, but no reason is assigned for the assertion, nor is any decision upon the point on record until the time of the entry already mentioned.(*l*)

But, whatever might be the causes which occasioned this alteration, the effects they produced were highly important. A new efficacy was given to the action of ejectment, the old real actions fell into disuse, and in the subse-

(*i*) *Per Choke*, J. Mich. 33 Hen. VI. 42. 19.

(*k*) Rast. Ent. 253, (*a*)

(*l*) Brooke's Ab. tit. *Quare ejecit*, folio 167.

quent periods of our history, the action of ejectment became the regular mode of proceeding for the trial of possessory titles.

That an action of ejectment, by means of this alteration in its judgment, might restore termors to possession who had been actually ejected from their lands, is sufficiently obvious; but it is not, perhaps, so evident how the same proceeding could be applicable to a disputed title of freehold, or why, as soon after happened, the freeholder should have adopted this novel remedy. No report of the case in which this bold experiment was first made is extant; but from the innumerable difficulties which attend real actions, it is not surprising that the freeholder should take advantage of any fiction which enabled him to avoid them; and as the Court of Common Pleas possessed an exclusive right of judicature in matters of real property, it is probable that the experiment originated in the Court of King's Bench, as an indirect method of giving to that court a concurrent jurisdiction with the Common Pleas. But, however this may be, the experiment succeeded, and the uses of the action, as well as its nature, were changed.

When first the remedy was applied to the trial of disputed titles, the proceedings were simple and regular, differing but little from those previously in use, when an ejectment was brought to recover the damages of an actual trespass. The right to the freehold could only be determined in an indirect manner. It was a term which was to be recovered by the judgment in the action, and it was therefore necessary that a term should be created; and as the injury complained of in the writ was the loss of the possession, it was also necessary that the person to whom the term was given, should be ejected from the lands.

In order to obtain the first of these requisites, namely, a term, the party claiming title entered upon the disputed premises, accompanied by another person, to whom, whilst on the lands, he sealed and delivered a lease for years. This actual entry was absolutely necessary ; for, according to the old law of maintenance, it was a penal offence to convey a title to another, when the grantor himself was not in possession. And, indeed, it was at first doubted, whether this nominal possession, taken only for the purpose of trying the title, was sufficient to excuse him from the penalties of that offence.(*m*)

It is from the necessity of this entry, also, that the remedy by ejectment is confined to cases in which the claimant has a right to the possession. When only a right of property, or a right of action, remained to him, the entry would be illegal, and consequently not sufficient to enable the party making it to convey a title to his lessee: and as the principles of the action still remain the same, although its proceedings are changed, the right to make an entry continues to be requisite, though the entry itself is no longer necessary.

The lessee of the claimant, having acquired a right to the possession, by means of the lease already mentioned, remained upon the land, and then the person who came next upon the freehold, *animo possidendi*, or according to the old authorities, even by chance,(*n*) was accounted an ejector of the lessee, and a trespasser on his possession. A writ of trespass and ejectment was then served upon the ejector by the lessee. The cause regularly proceeded to trial as in the common action of trespass ; and as the les-

(*m*) 1 Ch. Rep. Append. 29. (*n*) 1 Lil. Prac. Reg. 673.

see's claim could only be founded upon the title of his lessor, it was necessary to prove the lessor's interest in the land, to enable the plaintiff (the lessee) to obtain a verdict. The claimant's title was thus indirectly determined; and, although the writ of possession must of course have been issued in the plaintiff's name, and not in his own, yet as the plaintiff had prosecuted the suit only as the lessor's friend, he would immediately give up to him the possession of the lands.

In the infancy of the experiment, this mode of proceeding could be attended with no ill consequences. As the party previously in possession, must, in contemplation of the law, be upon the lands, and certainly *animo possidendi*, the friend of the claimant was allowed to consider him as an ejector, and make him the defendant in the action. When, however, the remedy became more generally used, this simple method was found to be productive of considerable evil. It was easy for the claimant to conceal the proceedings from the person in possession, and to procure a second friend to enter upon the lands, and eject his lessee immediately after the execution and delivery of the lease. The lessee would then commence his suit against this ejector, and the party in possession might consequently be ousted of his lands, without any opportunity of defending his title. To check this evil, a rule of court was made, forbidding a plaintiff in ejectment to proceed against such third person, without giving a previous notice of the proceedings to the party in possession; and it was the practice for such party, on the receipt of this notice, if he had any title to the lands, to apply to the court for permission to defend the action; which application was uniformly granted, upon his undertaking to indemnify the defendant (the third person) from the expenses of the suit. The

action, however, proceeded in the name of such defendant, though the person in possession was permitted at the trial to give evidence of his own title.

A considerable alteration in the manner of proceeding in the action was occasioned by this rule, although it was only intended to remedy a particular evil. It became the general practice to have the lessee ejected by some third person, since called the casual ejector, and to give the regular notice to the person in possession, instead of making him, as before, the trespasser and defendant. A reasonable time was allowed by the courts, for the person in possession, after the receipt of the notice, to make his application for leave to defend the action, and, if he neglected to do so, the suit proceeded against the casual ejector, as if no notice had been necessary.

The time when this rule was made is unknown, but as the evil it was intended to remove must soon have been discovered, it probably was adopted shortly after the remedy grew into general use.(*o*) It seems, also, to have been the first instance in which the courts interfered in the practice of the action, and is therefore remarkable as the foundation of the fictitious system by which it is now conducted.

In this state, with the exception of a few practical regulations, not necessary to be here noticed, the action of ejectment continued until the time of the Commonwealth. Much trouble and inconvenience, however, attended the observance of the different formalities. If several persons were in possession of the disputed lands, it was necessary to execute separate leases upon the premises of the dif-

(*o*) *Fairclaim*, d. *Fowler*, v. *Shamtitle*, Burr. 1290—1297.

ferent tenants, and to commence separate actions upon the several leases.(*p*) Difficulties also attended the making of entries, and the action of ejectment had, by this time, grown into such general use, as to make these inconveniences sensibly felt. A remedy, however, was discovered for them by Lord Chief Justice *Rolle*, who presided in the Court of Upper Bench during the Protectorate; and a method of proceeding in ejectment was invented by him, which at once superseded the ancient practice, and has by degrees become fully adapted to the modern uses of the action. (*q*)

By the new system, all the forms, which we have been describing, are dispensed with. No lease is sealed, no entry or ouster really made; the plaintiff and defendant in the suit are merely fictitious names, and in fact all those preliminaries are now only feigned, which the ancient practice required to be actually complied with.

An inquiry into the numerous regulations which have been made for the improvement of the modern practice, must be reserved for a future part of this work; but it may be useful to give in this place a brief outline of the system, although a detailed account will be hereafter necessary.

A., the person claiming title, delivers to *B.*, the person in possession, a declaration in ejectment, in which *C.* and *D.*, two fictitious persons, are made respectively plaintiff and defendant; and in which *C.* states a fictitious demise of the lands in question from *A.* to himself for a term of

(*p*) Co. Litt. 252. *Argoll* v. *Cheney*, Palm. 402.

(*q*) Styles, Prac. Reg. 108. (ed. 1657.)

years, and complains of an ouster from them by *D.* during its continuance. To this declaration is annexed a notice, supposed to be written and signed by *D.*, informing *B.* of the proceedings, and advising him to apply to the court for permission to be made defendant in his place, as he, having no title, shall leave the suit undefended. Upon the receipt of this declaration, if *B.* do not apply within a limited time to be made defendant, he is supposed to have no title to the premises; and upon an affidavit that a declaration has been regularly served upon him, the court will order judgment to be entered against *D.*, the casual ejector, and possession of the lands will be given to *A.*, the party claiming title. When, however, *B.* applies, pursuant to the notice, to defend the action, the courts annex certain conditions to the privilege. Four things are necessary to enable a person to support an ejectment, namely, title, lease, entry, and ouster; and as the three latter are only feigned in the modern practice, *C.* (the plaintiff) would be nonsuited at the trial if he were obliged to prove them. The courts, therefore, compel *B.* if made defendant, to enter into a rule, generally termed *the consent-rule*, by which he undertakes, that at the trial he will confess the lease, entry, and ouster, to have been regularly made, and rely solely upon the merits of his title; and, lest at the trial he should break this engagement, another condition is also added, that in such case he shall pay the costs of the suit, and shall allow judgment to be entered against *D.*, the casual ejector. These conditions being complied with, the declaration is altered, by making *B.* the defendant instead of *D.*, and the cause proceeds to trial in the same manner as in other actions.

The advantages resulting from this method are obvious: the claimant is exempted from the observance of useless

forms, and the tenant admits nothing which can prejudice the real merits of the case.

It could not, indeed, be expected that a change so extensive, should, in the first instance, be entirely free from defects, nor that it would not, like other innovations, occasion some inconvenience when first introduced. For a few years after its invention, the courts seem occasionally to have been confused between the ancient and modern systems, and not to have established, so distinctly as might have been desired, the principles which were to regulate the proceedings they had so newly adopted. The action has however, now attained a considerable degree of perfection. Its principles are clearly understood, and its practice is reduced to a regular and settled system. The legislature has frequently interfered to correct its deficiencies. The courts continue to regard it with great liberality; and the remedy by ejectment is, at the present time, a most safe and expeditious method of trying possessory titles, unembarrassed by the difficulties attendant on real actions, and well adapted to the purposes of substantial justice.

CHAPTER II.

OF WHAT THINGS AN EJECTMENT WILL LIE, AND HOW THEY ARE TO BE DESCRIBED.

By the common law, an ejectment will not lie for any thing, whereon an entry cannot be made, or of which the sheriff cannot deliver possession; or, in other words, it is only maintainable for corporeal hereditaments. Thus, an ejectment will not lie for a rent, an advowson, a common in gross, or *pur cause de vicinage*, or any other thing which passes only by grant. Tithes, indeed, though an incorporeal inheritance, may be recovered by this action, but the right of maintaining an ejectment for them, does not arise from the common law, but is given by the provisions of the statute 32 Hen. VIII. c. 7.

It was formerly holden that an ejectment did not lie for a chapel, though a corporeal hereditament, because it was *res sacra*, and, therefore, not demisable; but this doctrine is now exploded, though, in point of form, a chapel should still be demanded as a *messuage*.(*r*) A church may be also recovered in an ejectment when so demanded;(*s*) and it is

(*r*) *Harpur's* case, 11 Co. 25, (*b*). (*s*) *Hillingsworth* v. *Brewster*, Salk. 256. *Thyn* v. *Thyn*, Styles, 101. Doc. Plac. 291.

In one case said in argument, that after collation, ejectment will lie for a prebendal stall.(*t*)

A common, appendant or appurtenant, may be recovered in an ejectment, brought for the lands to which it is appendant or appurtenant, provided such right of common be mentioned in the description of the premises; because, he who has possession of the land, has also possession of the common, and the sheriff, by giving possession of the one, executes the writ as to the other. But it may be prudent to state in the description, that the common so claimed is a common appendant or appurtenant, although it has been held after verdict, that an ejectment for lands, and also for "common of pasture," generally is sufficient.(*u*)

An ejectment will also lie for a boilary of salt, although by the grant of a boilary of salt, the grantee is only entitled to a certain proportion of the number of buckets of salt water drawn out of a particular salt-water well; for by the grant of a boilary of salt, the soil shall pass, inasmuch as it is the whole profit of the soil.(*v*)

Upon the same principle an ejectment may be maintained for a coal mine; for it is not to be considered as a bare profit *apprender*, but as comprehending the ground or soil itself, which may be delivered in execution; and though a man may have a right to the mine without any title to the soil, yet the mine being fixed in a certain place, the sheriff has a thing certain before him, of which he can deliver possession.(*w*)

(*t*) *The King* v. *The Bishop of London*, 1 Wils. 11. 14.

(*u*) *Baker* v. *Roe*, Cas. Temp. Hard. 127. *Newman* v. *Holdmyfast*, Stran. 54.

(*v*) *Smith* v. *Barrett*, Sid. 161. S. C. 1 Lev. 114. Co. Litt. 4, (*b*).

(*w*) *Comyn* v. *Kinelo*, Cro. Jac. 150. *Comyn* v. *Wheally*, Noy, 121.

In the old cases it is holden, that an ejectment will not lie for a fishery, because it is only a profit *apprender*;(*x*) but it is said by *Ashhurst*, J., in the case of *The King* v. *the Inhabitants of Old Arlesford*,(*y*) "there is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, *and it may be recovered in ejectment.*"

But an ejectment will not lie for a water-course, or rivulet, though its name be mentioned, because it is impossible to give execution of a thing which is transient, and always running.[1] When, however, the ground over which the rivulet runs, is the property of the claimant, the rivulet may be recovered, by laying the action for "so many acres of land covered with water."(*z*) An ejectment may be maintained for a pool, or pit of water, because those words comprehend both land and water.(*a*)

The owner of the soil may maintain an ejectment for land, which is part of the king's highway; because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner. He must, however,

(*x*) *Molineux* v. *Molineaux*, Cro. Jac. 144. *Herbert* v. *Laughlyn*, Cro. Car. 492. *Waddy* v. *Newton*, 8 Mod. 275—277.

(*y*) 1 T. R. 358.

(*z*) *Challenor* v. *Thomas*, Yelv. 143.

(*a*) *Ibid.* Co. Litt. 5, (*b*).

[1] If a grantor reserve the right of erecting a mill-dam for a certain distance on a creek, "*and to occupy and possess the premises,*" without hindrance or molestation from the grantee, or his heirs, he has such an interest in the land reserved as will support ejectment. *Jackson* v. *Buel*, 9 Johnson, 298. In this case the Court say, "*wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an ejectment will lie.*" But the grant of a privilege to erect a machine and building on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not, without actual entry or location, confer such a right, as to support ejectment. *Jackson* v. *May*, 16 Johnson, 184.

recover the land, and the sheriff give possession of it, subject to the public easement.(*b*) [2]

An ejectment will lie *pro prima tonsura*, that is to say, if a man has a grant of the first grass which grows on the land every year, he may maintain ejectment against him who withholds it from him.(*c*) So also a demise of the hay-grass and after-math is sufficient to support an ejectment.(*d*) And the principle seems to be this, that the parties in these cases, being entitled to all the profits of the land for the time being, are entitled also for the same time to the land itself; and no man can enter thereon, whilst they are so entitled, without being a trespasser. But the ejectment should not be brought for the land generally, but for the first grass or after-math thereof as the case may be; although where the demise was for so many acres of pasture land, it was held sufficient for the lessor of the plaintiff, in the first instance, to show that he was entitled to the *prima tonsura* thereof, because the first grass being the most signal profit, the freehold of the land shall be esteemed to be in him who has it, until the contrary is shown.(*e*)

A right to the herbage will also be sufficient to support an ejectment, because, he who has a grant of the herbage, has a particular interest in the soil, although by such grant the

(*b*) *Goodtitle*, d. *Chester*, v. *Alker*, Burr. 133. 145.
(*c*) *Ward* v. *Pelifer*, Cro. Car. 362.
(*d*) *Wheeler* v. *Toulson*, Hard. 330.
(*e*) *Rex* v. *Inhabitants of Stoke*, 2 T. R. 451.

[2] The owner of land, over which a highway is laid out, may use the land in any manner, not inconsistent with the public right or easement, and may maintain ejectment for it. *Cortelyou* v. *Van Brundt*, 2 Johnson, 357. *Jackson* v. *Hathaway*, 15 Johnson, 447. *Perley* v. *Chandler*, 6 Mass. Rep. 454. *Commonwealth* v. *Peters*, 2 Mass. Rep. 125.

soil itself does not pass. But the ejectment should be for the herbage of the land, and not for the land itself.(*f*)

In like manner an ejectment will lie for the pasture of a hundred sheep.(*g*)

But a right to the pannage is not enough, because pannage is only the mast which falls from the trees, and not part of the soil itself.(*h*)

With respect to the manner in which the disputed premises should be described in an ejectment, no determinate rule exists; nor is it easy to discover from the adjudged cases, any principle which can guide us on the subject. It is very frequently said, in general terms, that the description shall be *sufficiently certain;* but the degree of certainty required, particularly in the more ancient cases, seems to depend upon caprice rather than principle. In the earlier stages of the remedy, when ejectments were compared to real actions, and arguments were drawn from analogy with them, a practice which obtained until after the reign of James I., much greater certainty was required than is now necessary; and it appears, that when the action was first invented, as much certainty was requisite as in *a præcipe quod reddat.*(*i*) The courts, indeed, soon relaxed this severity, and allowed many descriptions to be sufficient in an ejectment, which would have been held too uncertain in a *præcipe;* as, for instance, an ejectment for a hop-yard was held good; so also for an orchard, though in a *præcipe* it should be demanded as a garden;(*j*) yet, notwithstanding

(*f*) *Wheeler* v. *Toulson*, Hard. 330.
(*g*) *Anony.* 2 Dal. 95.
(*h*) *Pemble* v. *Sterne*, 1 Lev. 212, 3. S. C. 1 Sid. 416.
(*i*) *Macdunoch* v. *Stafford*, 2. Roll. Rep. 166.
(*j*) *Wright* v. *Wheatley*, Noy, 37. S. C. Cro. Eliz. 854. *Royston* v. *Eccleston*, Cro. Jac. 654. S. C. Palm. 337.

this alteration, it was considered an established principle, until within the last fifty years, that the description must be so certain as to enable the sheriff exactly to know, without any information from the lessor of the plaintiff, of what to deliver possession.(*k*) Amongst other salutary regulations, however, which the wisdom of modern times has introduced into this action, the abolition of the above-mentioned maxim may be reckoned; and it is now the practice for the sheriff to deliver possession of the premises recovered, according to the directions of the claimant, who therein acts at his own peril.(*l*)

Few cases are to be found in the modern books, wherein points respecting the certainty of description have arisen, and the authority of the old cases is very doubtful. The degree of certainty formerly required was much greater than is now necessary, and it is not improbable that many of the old decisions would be overruled, should they again come under the consideration of the courts.(*m*)

Lands will be sufficiently described by the provincial terms of the counties in which they lie. Thus, an ejectment may be maintained for "five acres of alder carr" in *Norfolk*:—alder carr, in that county, signifying land covered with alders. So, also, in *Suffolk*, for a beast gate; and in *Yorkshire*, for cattle gates.(*n*)

The same principle applies to ejectments in *Ireland*, and terms used in that country will be sufficiently certain, when writs of error are brought therefrom in this kingdom.

(*k*) *Binlover* v. *Sindercombe*, 2 Raym. 1470. and the cases there cited.

(*l*) *Cottingham* v. *King*, Burr. 623. 630. *Connor* v. *West*, Burr. 2672.

(*m*) *St. John* v. *Comyn*, Yelv. 117, *Cottingham* v. *King*, Burr. 623.

(*n*) *Barnes* v. *Peterson*, Stran. 1063. *Bennington* v. *Goodtitle*, Ib. 1084.

Thus, an ejectment will lie in *Ireland*, for a township, for a kneave,(*o*) or quarter of land, or for so many acres of bog or of mountain,(*p*) the word mountain being in that kingdom, rather a description of the quality, than the situation of land.(*q*)

But an ejectment in *England* for a hundred acres of mountain, or a hundred acres of waste, has been held to be bad for uncertainty, because both waste and mountain comprehend in *England* many sorts of land.(*r*)

It is no objection to a description that the premises are twice demanded in the same demise.(*s*)

An ejectment will not lie for a tenement, because many incorporeal hereditaments are included in that appellation,(*t*) and, therefore, the description is not certain enough; nor will an ejectment lie for a messuage *or* tenement, for the signification of the word tenement being more extensive than that of the word messuage, it is not sufficiently certain what is intended to be demanded in the ejectment.(*u*) It is also holden that an ejectment will not lie for a messuage *and* tenement.(*v*)

(*o*) *Cottingham* v *King*, Burr. 623. 630.

(*p*) *Barnes* v. *Peterson*, Stran. 1063. *Bennington* v. *Goodtitle*, Ib. 1084.

(*q*) *Kildare* v. *Fisher*, Stran. 71. *vide cont. Macdonnogh* v. *Stafford*, Palm. 100. S. C. 2 Roll. Rep. 189. *St. John* v. *Comyn*, Yelv. 117.

(*r*) *Hancock* v. *Price*, Hard. 57.

(*s*) *Warren* v. *Wakeley*, 2 Roll. Rep. 432.

(*t*) *Goodtitle* v. *Walton*, Stran. 834. *Gopleston* v. *Piper*, Ld. Raym. 191.

(*u*) *Ashworth* v. *Stanley*, Styl. 364. *Wood* v. Payne, Cro. Eliz. 186. *Rochester* v. *Rickhouse*, Pop. 203.

(*v*) *Doe*, d. *Bradshaw*, v. *Plowman*, 1 East, 441. and the cases there cited. In the case of *Goodwright*, d. *Welch*, v. *Flood*, (3 Wils. 23.,) in which a motion was made to arrest the judgment, because the plaintiff had declared of a messuage or tenement, the Court endeavoured to get over the objection, and took time for consideration, but ultimately thought themselves bound

But an ejectment for a messuage *or* tenement, with other words expressing its meaning, is good, as a messuage or tenement *called the Black Swan*; for the addition reduces it to the certainty of a dwelling-house.(*w*)

So also an ejectment for a messuage or burgage, is good; because both signify the same thing in a borough.(*x*)

An ejectment for four corn mills, without saying of what kind, whether wind-mills, or water-mills, is good; for the precedents in the register are so.(*y*)

An ejectment will lie for a stable and cottage,(*z*) and also for a house; though in a *præcipe* it ought to be demanded by the name of a messuage.(*a*)

Ejectment of a place called a passage-room is certain

by the adjudged cases, and reluctantly arrested the judgment. Afterwards, in *Doe*, d. *Stewart*, v. *Denton*, (1 T. R. 11.,) on a similar application, where the plaintiff had declared for a messuage *and* tenement, the Court refused to grant the rule, *Buller*, J. saying, he remembered a case where a messuage *or* tenement had been held sufficiently certain. But this case was afterwards overruled, in *Doe*, d. *Bradshaw*, v. *Plowman*, (1 East, 441.,) "for that it passed by surprise, and was not law, being contrary to adjudged cases." The point is therefore now at rest, although, from the more recent case of *Goodtitle*, d. *Wright*, v. *Otway*, (8 East, 357.) the defendant is precluded from deriving any advantage from such error in description. In that case, the plaintiff had declared for a messuage *and* tenement, and the verdict was entered generally; but the Court permitted the lessor (pending a rule *nisi* to arrest the judgment for the uncertainty) to enter the verdict according to the Judges' notes for the messuage *only*, and that without releasing the damages.

(*w*) *Burbury* v. *Yeomans*, 1 Sid. 295.

(*x*) *Danvers* v. *Wellington*, Hard. 173. *Rochester* v. *Rickhouse*, Pop. 203.

(*y*) *Fitzgerald* v. *Marshall*, 1 Mod. 90.

(*z*) *Hill* v. *Giles*, Cro. Eliz. 818. Lady *Dacres'* case, 1 Lev. 58. *Hamond* v. *Ireland*, Sty. 215.

(*a*) *Royston* v. *Eccleston*, Cro. Jac. 654. S. C. Palm. 337.

enough.(*b*) So also of a room, and of a chamber in the second story.(*c*) In like manner it has been held that an ejectment for "part of a house in *A.*" is sufficiently certain.(*d*) So also of "a certain place called the vestry."(*e*)

It has formerly been holden that ejectment for a kitchen could not be supported; because, although the word be well enough understood in common parlance, yet, as any chamber in a house may be applied to that use, the sheriff has not certainty enough to direct him in the execution, and the kitchen may be changed between judgment and execution; but this reasoning does not correspond with the maxims of the present day.(*f*)

An ejectment will not lie for a close,(*g*) nor for the third, or other part of a close, nor for a piece of land, unless the particular contents, or number of acres, be specified.(*h*) From the old authorities, it seems also formerly to have been holden, (though the point is certainly somewhat obscure,) that the addition of the name of the close, without mention of the number of acres, would be bad; though such a description, it is conceived, would now be deemed sufficiently certain.(*i*)

In ejectment for land, the particular species should be

(*b*) *Bindover* v. *Sindercombe*, Ld. Raym. 1470.

(*c*) *Anony.* 3 Leon. 210.

(*d*) *Sullivan* v. *Seagrave*, Stran. 695. *Rawson* v. *Maynard*, Cro. Eliz. 286.

(*e*) *Hutchinson* v. *Puller*, 3 Lev. 95.

(*f*) *Ford* v. *Lerke*, Noy, 109.

(*g*) *Savel's* case, 11 Co. 55. *Hammond* v. *Savel*, 1 Rol. Rep. 55. *Knight* v. *Syms*, Salk. 254. *Joans* v. *Hoel*, Cro. Eliz. 235.

(*h*) *Palmer's* case, Owen, 18. *Martyn* v. *Nichols*, Cro. Car. 573. *Jordan* v. *Cleabourne*, Cro. Eliz. 339. *Pemble* v. *Sterne*, 1 Lev. 213.

(*i*) Lady *Dacres'* case, 1 Lev. 58. *Savel's* case, 11 Co. 55. *Knight* v. *Syms*, 1 Salk. 254. *Royston* v. *Eccleston*, Cro. Jac. 654. *Jordan* v. *Cleabourne*, Cro. Eliz. 339. *Wykes* v. *Sparrow*, Cro. Jac. 435.

mentioned in the description, whether *pasture*, *meadow*, &c. because land, in its legal acceptation, signifies only *arable* land.(*j*)

An ejectment for ten acres of underwood has been held good;(*k*) because underwood is so well understood in law, that the sheriff has certainty enough to direct him in the execution.

"Fifty acres of gorse and furze"(*l*) has been held sufficiently certain in an ejectment, without specifying the particular quantity of each: so also "fifty acres of furze and heath," and "fifty acres of moor and marsh."(*m*)

An ejectment for "ten acres of pease" has been held to be certain enough, as signifying the same with ten acres of land covered with pease.(*n*)

It seems that an ejectment may be brought for a manor, or a moiety of a manor, generally, without any description of the number of acres, or species of land contained therein, and that under such general description the jury may find a verdict for the plaintiff, for a messuage, or for so many acres "parcel of the said manor," and for the defendant, for the residue of the manor; but it is said in the old cases, not to be safe to bring an ejectment for a manor, without describing the quantity and species of the land.(*o*)

(*j*) *Massey* v. *Rice*, Cowp. 346, 349. *Sarel's* case, 11 Co. 55.

(*k*) *Warren* v. *Wakeley*, 2 Roll. Rep. 482.

(*l*) *Fitzgerald* v. *Marshall*, 1 Mod. 90.

(*m*) *Connor* v. *West*, Burr. 2672.

(*n*) *Odingsall* v. *Jackson*, 1 Brown, 149.

(*o*) *Warden's* case, Het. 146. *Cole* v. *Aylott*, Litt. Rep. 299, 301. *Hems* v. *Stroud*, Latch, 61.

When an ejectment is brought for tithes,(*p*) the particular species of tithe demanded, should be specified in the declaration, as of hay, wheat, &c. or the description will be bad for uncertainty;(*q*) but it is not also necessary to mention the precise quantity of each species, because tithe is in its nature uncertain, the quantity entirely depending on the fruitfulness of the season; and it is, therefore, enough to say, "of certain tithes of hay, wool, &c."(*r*)

In an old case, where the plaintiff declared on a lease for tithes in *R.*, belonging to the rector of *D.*, and that the defendant entered upon him, and took *such* tithes severed from the nine parts in *R.*, without saying that the tithes so taken belonged to the rectory of *D.*, the description was held ill, because it did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in *R.*, which did not belong to the rectory of *D.*(*s*)

In an ejectment brought in the county of *Durham*, the plaintiff declared "for coal mines in *Gateside*," generally, not specifying the particular number; and it appearing, upon a writ of error, that such was the customary mode of declaring in the county, the judgment for the plaintiff was affirmed.(*t*)

(*p*) It was once contended, that in an ejectment for tithes, the ejection should be laid, "of the rectory, or chapel, and of the tithes thereunto appertaining," for, that the plaintiff could not have a writ of *habere facias possessionem* of the tithes only: but the objection was overruled. *Baldwin* v. *Wine*, Cro. Car. 301.

(*q*) *Harpur's* case, 11 Co. 25. (*b*). *Warrall* v. *Harper*, 1 Roll. Rep. 65, 68. Dyer 84, 5.

(*r*) *Anony.* Dyer, 116, (*b*).

(*s*) *Baldwin* v. *Wine*, W. Jones, 321, *tamen quære, et vide Goodright*, d. *Smallwood*, v. *Strother*, Blk. 706.

(*t*) *Whittingham* v. *Andrews*, 4 Mod. 143. S. C. 1 Show. 364. S. C. Salk. 255. S. C. Carth. 277. S. C. Comb. 201.

If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land, without mentioning the building, except where the building is a messuage, and then perhaps it ought to be particularly named.(*u*)

(*u*) *Goodtitle*, d. *Chester*, v. *Alker*, Burr. 133, 144.

CHAPTER III.

OF THE TITLE NECESSARY TO SUPPORT THE ACTION OF EJECTMENT.

THE modern action of ejectment is the most simple and ready mode of trying every species of possessory title; and nearly all the minute and perplexing distinctions with which our laws of real property abound, are to be found in cases where this form of action has been adopted. A full inquiry into all the points discussed in these cases, would render this treatise far too voluminous for practical purposes, and, indeed, would be foreign to its design, which is to treat of the remedy by ejectment, and not of the laws of real property; whilst, on the other hand, an enumeration only of the different titles sufficient to support an ejectment, would be of little service either to the student or practitioner. It is intended therefore to keep a middle course, first discussing the general principles upon which the remedy is founded, and afterwards stating in succession the various persons, who, from the nature of their several estates, are entitled to maintain the action; pointing out the leading cases under each separate title, but leaving the more minute distinctions to those publications, which treat expressly of the laws of real property.

As the party in the possession of property is presumed to be the owner of the same, until the contrary is proved,

it is necessary for a claimant in ejectment to show in himself a good and sufficient title to the lands, to enable him to recover them from the defendant. He will not be assisted by the weakness of the defendant's claim. The possession of the latter, gives him a right against every man who cannot establish a good title; and if he can answer a *prima facie* case on the part of the lessor of the plaintiff, by shewing the real title to the land to be in another, it will be sufficient for his defence, without also proving that he holds the lands with the consent, or under the authority of the real owner.(v)[3] And the case will

(v) *Roe*, d. *Haldane*, v. *Harvey*, 4 Burr. 2484.

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[3] This rule, thus broadly laid down, is subject to numerous exceptions. A mortgagor is never suffered to set up the title of a third person against his mortgagee, *Doe* v. *Pegge*, 1 T. R. 758, *note*. So in ejectment by the second mortgagee against the mortgagor, the defendant was not suffered to set up the first mortgage in bar of the second. Ib. 760. S. C. 3 Wheaton's Rep. 225, 226. n. Bull. N. P. 110.

And the mortgagor is deemed the legal owner of the land, as to all persons except the mortgagee, and may maintain ejectment. *Collins* v. *Torrey*, 7 Johns. Rep. 278. *Willington* v. *Gale*, 7 Mass. Rep. 138. *Porter* v. *Millet*, 9 Mass. Rep. 101. *Hitchcock* v. *Harrington*, 6 Johns. 290. *Sedgwick* v. *Hallenback*, 7 Johns. 376. *Jackson* v. *Pratt*, 10 Johns. 381.

A person entering into possession under another, and acknowledging his title, cannot set up an outstanding title in a third person. *Jackson* v. *Stewart*, 6 Johns. 34. *Jackson* v. *De Walls*, 7 Johns. 157. *Menhall* v. *Wright*, 3 Mass. Rep. 138.

Whether there is a tenancy, or not, is matter of fact, and the defendant may produce parol evidence to disprove the existence of it. *Jackson* v. *Vosburgh*, 7 Johns. 186.

A lessee will not be permitted to show that the land leased to him is out of the boundaries of the lessor's premises. *Jackson* v. *Whitford*, 2 Caines' Rep. 215. *Brant* v. *Livermore*, 10 Johns. 358. 2 Camp. 12.

Where defendant entered under *A.*, and afterwards obtained a release from *B.*, he cannot set up *B.*'s title against a person claiming under *A.* *Jackson* v. *Hinman*, 10 Johns. 292.

Defendant entering into possession for a year, and holding over, cannot

not be varied, although the lessor can prove that he has previously been himself in possession of the premi-

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object to his lessor's title, or show title in a third person. *Jackson* v. *M'Leod*, 12 Johns. 182.

Defendant entering under one tenant in common, cannot, after partition made, object to the title of the co-tenant. *Jackson* v. *Creal* & *Kellogg*, 13 Johns. 116. and *Smith* v. *Burtis*, 9 Johns. 174.

A person coming into possession under *A.*, cannot set up a title which *A.* would not be permitted to set up. *Jackson* v. *Harder*, 4 Johns. 202.

A tenant cannot resist his landlord's recovery in ejectment, by virtue of an adverse title acquired during his lease. Lessee of *Galloway* v. *Ogle*, 3 Binney, 468.

A defendant entering without title, and afterwards agreeing to purchase of the lessor of the plaintiff, was held to have recognized him as landlord, and was not admitted to dispute his title. *Jackson* v. *Reynolds*, 1 Caines' Rep. 444. *Jackson* v. *Whitford*, 2 Caines' Rep. 215. *Jackson* v. *Vosburgh*, 7 Johns. 188.

But where tenant is in possession under an adverse title, and applies to the lessor of the plaintiff to purchase, and requests to be considered as his tenant, he was permitted to show that the application was founded in mistake, or that the fee existed in himself or out of the lessor. *Jackson* v. *Cuerden*, 2 Johns. Cas. 353.

A person in possession covenants to pay for the land—in ejectment by the covenantee, defendant is estopped from setting up an outstanding title, unless he can show deceit in the agreement. *Jackson* v. *Ayres*, 14 Johns. 224.

In ejectment by the grantee, in a mere voluntary conveyance, the heir of the grantor cannot set up want of consideration in bar of the action, for the deed, fraudulent as to creditors, is good against the grantor. *Jackson* v. *Garnsey*, 6 Johns. 189.

A purchaser under an execution, is in the place of the defendant, and *quasi* tenant, and, in ejectment by the landlord, cannot set up title in a third person. *Jackson* v. *Graham*, 3 Caines' Rep. 188.

Nor can the defendant, or a person in under him collusively, set up a title in a third person against the purchaser. *Jackson* v. *Bush*, 10 Johns. 223.

The rule that a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, does not apply against a plaintiff who was fraudulently induced by the defendant to purchase a weak title. *Lane* v. *Reynard*, 2 Sergeant & Rawle, 65.

Defendant claiming title under same survey as plaintiff, cannot object to the correctness of the survey. *Powers* v. *M'Ferran*, 2 Sergeant & Rawle, 44.

The purchaser of an equity redemption, sold on execution, can aver no title against any other person than the execution debtor, or his immediate assigns. *Forster* v. *Mellen*, 10 Mass. Rep. 421.

ses.[4] Thus, where a lease, made by a rector, was rendered void by his non-residence, his lessee was not allowed to recover against a stranger, who, without any title whatsoever, *ousted him*, and got possession.(*w*) So, also, where a man leased land for years, and his lessee, *after having been in possession a considerable time*, made an under lease, the under lessee, upon an ejectment brought by his immediate lessor,

(*w*) *Doe*, d. *Crisp*, v. *Barber*, 2 T. R. 749. It is said in the case of *Allen* v. *Rivington*, 2 Saund. 111. that "in ejectment, if it appear by the record of a special verdict, that the plaintiff has a priority of possession, and no title is found for the defendant, the plaintiff shall have judgment;" but this doctrine seems directly overruled, by the case here cited.

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[4] A mere trespasser or intruder, cannot protect himself by setting up an outstanding title in a stranger. *Jackson* v. *Harder*, 4 Johns. 202.

Where the plaintiff relied upon a mere possessory title, he was not bound to show a possession of twenty years, where the defendant had entered, without claim or color of title. The entry was tortious, and a party shall not derive a right from his own unlawful act. *Jackson* v. *Hazen*, 2 Johns. 24.

If the lessor shows himself in the peaceable possession of land, and that he was forcibly dispossessed, the defendant will not be permitted to set up title to defeat it. He must restore the party to his possession, wrongfully taken from him, in the first place. *People* v. *Leonard*, 11 Johns. 509.

But in the case of *Jackson* v. *Seelye*, (16 Johns. 200) *Spencer*, Ch. J. says, "individually, I am of opinion, that a forcible entry on the premises will not "estop the defendant from asserting an independent right to retain the possession. The action of ejectment includes a trespass, and is founded on "the notion that the defendant has forcibly entered upon the possession of "the nominal plaintiff. It may safely be asserted, that any defence, which, "as it respects the right to the premises, would protect the defendant from "the recovery of damages in an action of trespass *quare clausum fregit*, "will, *à fortiori*, protect a defendant in ejectment." In the case of *Hyatt* v. *Wood*, (4 Johns Rep. 150) it was decided, that if one having a possessory title to land, enters forcibly, and turns out a person who has a naked possession only, the latter could not maintain trespass, although the person entering forcibly might be indicted for a breach of the peace.

A naked possession is sufficient title on which to recover against a mere trespasser, who can show no better title. *Woods* v. *Lane*, 2 Serg. & Rawle, 53.

was allowed to shew that the lease from the original lessor had expired, and thereby nonsuited the plaintiff.(*x*) [5]

In order to enable a claimant to support an action of ejectment, he must be clothed with *the legal title* to the lands.(*y*) No equitable title will avail. And this principle is so fixed and immutable, that a trustee may maintain ejectment against his own *cestui que trust*;(*z*)[6] and an unsatisfied term outstanding in trustees will bar the recovery of the heir at law, even though he claim only subject to the charge.(*a*) In the time of Lord *Mansfield*,

(*x*) *England*, d. *Syburn*, v. *Slade*, 4 T. R. 682.

(*y*) *Goodtitle*, d. *Jones*, v. *Jones*, 7 T. R. 43, 47. *Doe*, d. *Da Costa*, v. *Wharton*, 8 T. R. 2. *Doe*, d. *Blake*, v. *Luxton*, 6 T. R. 289.

(*z*) *Roe*, d. *Reade*, v. *Read*, 8 T. R. 118, 123.

(*a*) *Doe*, d. *Hodson*, v. *Staple*, 2 T. R. 684.

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[5] But if defendant proves a title out of the lessor of the plaintiff, it must be a good and subsisting title, and if the plaintiff shows a good title, the presumption of the extinguishment of the outstanding title will be liberally indulged. *Jackson* v. *Hudson*, 3 Johns. Rep. 375. *Jackson* v. *Todd*, 6 Johns. 257.

Where more than 20 years have run against an outstanding title, it cannot be set up as a bar. *Jackson* v. *Harder*, 4 Johns. 202.

So, where a defendant produces a lease for 1000 years to another, he must show possession under the lease within twenty years. Bull. N. P. 110.

[6] This principle has been recognized by the Supreme Court of New-York, in the case of *Jackson* v. *Deyo*, 3 Johns. Rep. 423. The only way in which an equitable title can be assisted at law, is, by allowing the presumption in certain cases to prevail, that there has been a conveyance of the legal estate. *Jackson* v. *Pierce*, 2 Johns. Rep. 221.

But when the case precludes any such presumption, the legal title is peremptory, and must prevail, and especially if the equitable title be dubious. *Jackson* v. *Sisson*, 2 Johns. Cases, 321. *Jackson* v. *Van Slyck*, 8 Johns. 487.

In Pennsylvania, where there is no Court of Chancery, the courts at law stay the execution, where defendant has an equitable title to the lands. Lessee of *Mathers* v *Akeweright*, 2 Binney, 93.

In that State the vendee of lands may recover them by ejectment, under articles of agreement for the sale, upon tendering the purchase money, and their courts at law enforce articles of agreement for the sale of lands, by ejectment, in all cases where a Court of Chancery would decree a specific performance. *Hawn* v. *Norris*, 4 Binney, 77.

indeed, the Court of King's Bench seemed inclined to adopt a different principle, and to exercise a species of equitable jurisdiction in this action. Thus, a mortgagee was permitted to maintain ejectment against a tenant, claiming under a lease granted prior to the mortgage, provided he gave notice to the tenant, that he did not intend to disturb the possession, but only to get into the receipt of the rents and profits of the estate;(*b*) the legal estate of a trustee was not allowed to be set up against the *cestui que trust*;(*c*) and a reversioner was allowed to recover his reversionary interest, subject to a lease and immediate right of possession in another.(*d*) These cases, however, have long been overruled, and the clearness and certainty of the principle since adopted amply compensate for the partial inconvenience it may at times occasion.

The claimant must also have a right to the possession; that is to say, he must have a right of entry upon the lands at the time of the demise in the declaration. And whatever takes away this right of entry or possession, and turns the same into a right of action, will also deprive the claimant of his remedy by ejectment, although the legal title still remains in him. But if he be entitled to the possession at the time the demise is laid, it will be sufficient, although such right of possession be divested before trial; for the action of ejectment is intended to give the party compensation for the trespass, as well as to enable him to recover possession of the land; and he has a right to proceed for

(*b*) *Keech*, d. *Warne*, v. *Hall*, Doug. 21. *Moss* v. *Gallimore*, Doug. 279. B. N. P. 96.

(*c*) *Lade* v. *Holford*, B. N. P. 110. S. C. Burr. 1416. S. C. Blk. 428. *Doe*, d. *Hodson*, v. *Staple*, 2 T. R. 684. *Doe*, d. *Gibbon*, v. *Pott*, Doug. 710. 721, *et vide Oates*, d. *Wigfall*, v. *Brydon*, Burr. 1895. 1901.

(*d*) *Per Buller*, J. in *Doe*, d. *Bristow*, v. *Pegge*, 1 T. R. 759. (*in notis.*)

such trespass, although his right to the possession should cease.(e)[7]

The origin of the principle, that the lessor must have a right of entry, has already been considered,(f) and we must now notice the several ways by which this right of entry or possession may be destroyed. The consideration of the effects of fines levied with proclamations, and of the right of entry, as between landlord and tenant, for condition broken, will be reserved for the two following chapters: those acts only are here to be considered, which take away the right of entry from the claimant, but leave in him, notwithstanding, the right of property or of action.

In this point of view, a right of entry may be destroyed in three several ways. First, by Discontinuance; secondly, by Descent; and, thirdly, by the Statute of Limitations.

I. By Discontinuance.

A discontinuance of an estate signifies such an alienation made or suffered, by any person seised of an estate-tail, or *in autre droit*, in things which lie in livery, as takes away the entry of the person entitled after the death of the alienor.

"This injury happens when he who hath an estate-tail, maketh a larger estate of the land than by law he is en-

(e) *Doe*, d. *Grundy*, v. *Clarke*, 14 East, 488.

(f) *Vide ante*, 10.

[7] Ejectment being merely a possessory remedy, will not lie in favor of a person already in possession; and, therefore, a landlord having obtained possession, cannot bring ejectment, in order to bar the right of his absconding lessee. *Jackson* v. *Hakes*, 2 Caines' Rep. 335.

titled to do: in which case the estate is good, so far as his power extends who made it, but no farther. As if a tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail; all which are beyond his power to make, for that, by the common law, extends no farther than to make a lease for his own life: here the entry of the feoffee is lawful during the life of his feoffor; but if he retains the possession after the death of the feoffor, it is an injury, which is termed a discontinuance; the ancient legal estate, which ought to have survived to the heir in tail, being gone, or at least suspended, and for a while discontinued. For, in this case, on the death of the alienors, neither the heir in tail, nor they in remainder or reversion, expectant on the determination of the estate-tail, can enter on and possess the lands so alienated; because, the original entry of the feoffee being lawful, and an apparent right of possession being thereby gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant.(g)

By the common law, an estate-tail may be discontinued five ways: first, by confirmation with warranty; secondly, by feoffment; thirdly, by fine; fourthly, by common recovery; fifthly, by release.[8]

An estate-tail cannot, however, be discontinued, except where he, who makes the discontinuance, was once seised by force of the in-tail, that is, seised of the freehold and

(g) 3 Blk. Com. 171, 5.

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[8] By a statute of New-York, (1 Rev. Laws, 52.) tenancies in-tail are abolished; and persons who, if the act were not passed, would be seised in fee-tail, are, by that statute, declared to be seised in fee-simple.

inheritance of the estate in tail, and not of a remainder or reversion expectant upon a freehold.(*h*) Hence, if there be tenant for life, the remainder in-tail, &c. and tenant for life, and he in the remainder in-tail levy a fine, this is not any discontinuance or devesting of any estate in remainder, but each of them passes that which they have power and authority to pass.(*i*)

So, also, to make a discontinuance, by levying a fine, it is necessary that the estate should pass to the alienee by virtue of the fine; if, therefore, the tenant in-tail first alienate his estate, by modes of conveyance, which transfer only the possession, and not the right, as by bargain and sale, lease and release, &c. and the grantee *is seised by virtue of such conveyance*, a fine, levied afterwards by the tenant in tail, will not operate as a discontinuance of the estate-tail; but the right of entry will remain to the remainder-man, or reversioner, for the first five years after his title accrues.(*j*)

But, where tenant in tail-male, with remainder over in fee, in consideration of a marriage, conveyed his estate-tail by lease and release, to trustees, and their heirs, to several uses, and, in the release, covenanted to levy a fine to the same uses, and did, after his marriage, levy a fine, in pursuance of his covenant, it was held that this fine operated as a discontinuance of the estate; because, the lease, release, and fine, were all but *one assurance*, and operated as such; for, that the deeds could only be considered as *a covenant to levy a fine*, and were incomplete till the fine was levied, so that the estate-tail passed by the fine.(*k*)

(*h*) 1 Inst. 347, (*b*), *et vide* Litt. s. 640. 658.

(*i*) 1 Inst. 302, (*b*).

(*j*) *Seymour's* case, 10 Co. 96,(*a*).

(*k*) *Doe*, d *Odiarne*, v. *Whitehead*, Burr. 704.

This case was distinguished from *Seymour's*, because, in that case, the fine was not levied until a year after the bargain and sale was enrolled, and it was expressly found by the verdict, that the bargainee entered, and was seised by force of the bargain and sale *only;* so that the bargain and sale was totally unconnected with the fine; nor did it appear that any fine was intended to be levied at the time when the bargain and sale was executed.

In the case of *Moor* v. *Blake*,(*l*) which was an ejectment tried before the late Mr. Justice *Gould*, the title of the lessor of the plaintiff was under a marriage settlement, by which certain premises were settled on the husband and wife for their lives, and the life of the survivor, remainder to trustees, to preserve contingent remainders, remainder (after a power of appointment which had never been executed) to all and every the children of the marriage, as tenants in common *in-tail*, with cross remainders, in default of issue of any child, to the survivors *in-tail*, with remainder to the survivor of husband and wife, in fee. Three daughters were the issue of the marriage; the first of whom died without issue, the second married the lessor of the plaintiff, and the third married the defendant *Blake*, and died *without issue;* previous to her death, however, she and her husband had levied a fine, with proclamations of her moiety, to recover which the ejectment was brought. The counsel for the defendant proved the fine levied with proclamations, upon which the plaintiff was nonsuited: the learned judge declaring, that, in his opinion, the levying of the fine had discontinued the estate-tail, taken away the claimant's right of entry, and driven him to his writ of formedon.

(*l*) Run. Eject. 45

By the common law, the alienation of a husband, who was seised in right of his wife, worked a discontinuance of her estate; but now, by the 32 Hen. VIII. c. 28. s. 6. it is provided, that no act of the husband only shall work a discontinuance of, or prejudice, the inheritance or freehold of the wife; but that, after his death, she, or her heirs, may enter on the lands in question; and, therefore, the wife, or her heirs, may now, in such cases, support ejectment.

A feoffment by husband and wife is within this statute; because, in substance, it is the act of the husband only; but a fine levied by the husband and wife is not.(*m*)[9]

When, also, the husband and wife are jointly seised to them and their heirs, or the heirs of their two bodies, of an estate made during the coverture, and the husband makes a feoffment in fee, and dies, the wife may enter under the provisions of this statute, although it was the inheritance of them both.(*n*)

By the statute of 11 Hen. VII. c. 20. it is also provided,

(*m*) 1 Inst. 326, (*a*). *Cromwell's* case, 2 Co. 77, (*b*).

(*n*) 1 Inst. 326, (*a*). *Greenley's* case, 8 Co. 142, (*b*).

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[9] By a statute of New-York, (1 Rev. Laws, 369.) a feme-covert may convey lands by deed, by acknowledging its execution, on being examined by a judge, &c. privately, and apart from her husband.

A grant in fee, by husband and wife, of the wife's lands, not acknowledged by the wife, passes only the husband's interest, and the estate, after his death, reverts to his wife or her heirs. *Jackson* v. *Sears*, 10 Johns. 435.

And her subsequent acknowledgment does not relate back to the time of the execution of the deed. *Jackson* v *Stevens*, 16 Johns. 110.

Where husband and wife execute a deed of wife's lands, which was not then acknowledged, and they afterwards execute and acknowledge another deed of the same land, to a second person, and the wife afterwards acknowledges the first deed, the title to the land is vested in the second grantee. *Ibid.*

that "if a woman has any estate-tail jointly with her husband, or only to herself, or to her use, in any lands or hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in tail, by any of the ancestors of the husband, or by any other person seised to the use of the husband, or his ancestors, and shall hereafter, being sole, or with any other after-taken husband, discontinue, &c. the same, every such discontinuance shall be void, and it shall be lawful for every person to whom the interest, title, or inheritance, after the decease of the said woman, should appertain, to enter," &c.

This statute is, for the most part, confined to conveyances by the husband, or his ancestor, for the advancement of the wife.(*o*) Hence, if land be settled by the ancestor of the wife, in consideration of the marriage, it is not within this act; for it shall be intended that the advancement of the wife was the principal cause of the gift.(*p*) But, where the conveyance is by a stranger, in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the husband, it is within the act.(*q*) So, if the conveyance be by the husband, or his ancestor, in consideration of marriage, although it be joined with a money consideration, yet it is within the statute.(*r*) But no estate is within the meaning of this statute, unless it be for the jointure of the wife. Hence, although an estate devised by the husband to the wife in tail, with remainder over to a stranger in fee, be within the words, yet it is not within the meaning of the statute; for it shall not be intended to be for a jointure, where no inheritance is reserved to the husband or his heirs, and the meaning of the sta-

(*o*) *Foster* v. *Pilfall*, Cro. Eliz. 2. S. C. 1 Leon. 261.
(*p*) *Kynaston* v. *Lloyd*, Cro. Jac. 624.
(*q*) *Piggot* v. *Palmer*, Moore, 250.
(*r*) *Kirkman* v. *Thomson*, Cro. Jac. 474.

tute is, that the wife shall not prevent the lands descending to the heirs of the husband.(*s*)

If the issue in special-tail, with reversion in fee expectant, levy a fine, and afterwards his mother, being tenant in tail within this act, make a lease for three lives (not warranted by the statute 32 Hen. VIII. c. 28.) living the issue; the conusee may enter.(*t*) But if the reversion in fee had been in another, the conusee could not enter, because he would have nothing but by estoppel; nor the heir, because he had concluded himself by the fine;(*u*) nor the issue.(*v*)

Formerly an alienation made by a sole corporation, as a bishop, or a dean, without the consent of the chapter, was a discontinuance; but since the disabling statutes,(*w*) which declare such alienations absolutely void, *ab initio*, no discontinuance can by such means be effected.(*x*)

2. By Descent.(*y*)

"Descents, which take away entries, are, when any one, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends

(*s*) *Foster* v. *Pitfall*, Cro. Eliz. 2. S. C. 1 Leon. 261.

(*t*) *Brown's* case, 3 Co. 60, (*b*).

(*u*) *Ward* v *Walthew*, Cro. Jac. 178.

(*v*) *Lincoln Coll.* case, 3 Co. 61, (*a*).

(*w*) 1 Eliz. c. 19. 13 Eliz. c. 10.

(*x*) F. N. B. 194.

(*y*) It is scarcely possible to suggest a case, in which the doctrine of descent cast can be now so applied, as to prevent a claimant from maintaining ejectment, as, from the principles of disseisin at election, he may always lay his demise in the time of the ancestor, and elect not to be disseised; but a general account of the doctrine of descent cast is given here, in order to render this part of the subject complete. *Vide Taylor*, d. *Atkins*, v. *Horde*, (Burr. 60.) where the history and principles of the doctrine of descent cast are most ably investigated by Lord *Mansfield*. *Vide* also *William*, d. *Hughes*, v. *Thomas*, (12 East, 141.)

to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law, therefore, protects his title, and will not suffer his possession to be divested, till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title; and, therefore, the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title; and leaves the claimant only the remedy of an action against the heir. Thirdly, this was admirably adapted to the military spirit of the feudal tenures, and tended to make the feudatory bold in war; since his children could not, by any mere entry of another, be dispossessed of the lands whereof he died seised. And, lastly, it is agreeable to the dictates of reason, and general principles of law."(z)

This doctrine of descent cast does not apply, if the claimant be under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because, in all these cases there is no neglect or laches in the claimant, and, therefore, no descent shall bar or take away his entry.(a) Nor does it affect copyhold, or customary estates, where the freehold is in the lord;(b) nor cases where the party has not any remedy but by entry, as a devisee.(c)

(z) 3 Blk. Com. 176.
(a) Litt. l. 3. c. 6.
(b) *Doe*, d. *Cook*, v. *Danvers*, 7 East, 299.
(c) Co. Litt. 240, (b).

The right of entry may be tolled, or taken away, by a descent cast, in cases of abatement, intrusion, and disseisin.[1]

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[1] "The distinction between a disseisin, by election, as contradistinguished from a disseisin, in fact, was taken for the benefit of the owner of the land, and to extend to him the easy and desirable remedy of assise of novel disseisin, instead of the more tedious remedy by a writ of entry. Whenever an act is done, which, of itself, works an actual disseisin, it is still taken to be an actual disseisin, as if a tenant, for years, or at will, should enfeoff in fee. On the other hand, those acts, which are susceptible of being made disseisins by election, are no disseisins till the election of the party makes them so; as if a tenant at will, instead of making a feoffment in fee, should only make a lease for years. The distinctions between disseisins in fact, and disseisins by election, were enforced in the very distinguished case of *Atkyns* v. *Horde*, (1 Burr. 60.) and they have been historically and ingeniously illustrated by Mr Butler, in a note to Coke Littleton, 330, b. note 285." Per *Kent*, J. *Jackson* v. *Rogers*, 1 Johns. Cas. 36.

An actual disseisin is necessary in order to cast a descent. The rightful owner must have been tortiously ousted, either by violence, or by some act that the law regards as equivalent in its effects. Disseisin is an estate gained by wrong and injury, and therein differs from dispossession, which may be by right or wrong A peaceable entry on land, apparently vacant, furnishes, *per se*, no presumption of wrong. An entry, not appearing to be hostile, is to be considered an entry under the title of the true owner. Where the heir relies on a descent east, he must show the entry of his ancestor to have been tortious, and *not congeable*. *Smith* v. *Burtis*, 6 Johns. 198—also, vide *Jackson* v. *Schoonmaker*, 4 Johns. 390. and authorities cited.

The surrender of the lands of an infant (*sed quære*) to a third person, by his guardian, is a disseisin, and the infant is bound to bring his action within ten years after coming of age. *Jackson* v. *Whitlock*, 1 Johns. Cas. 213.

A lease for years, by a tenant at will, is no disseisin, unless the true owner elect to make it so; nor does it destroy his capacity to devise. *Blunden* v. *Baugh*, Cro. Car. 302.

A disseisin renders the disseisee incapable of devising; for a devisor must die seised, and the disseisee has only a right of entry, which is not devisable. Powell on Devises, 184. Roberts on Wills, 297. *Bunker* v. *Cook*, 11 *Mod.* 128. *Goodright* v. *Forester*, 8 East, 566. Cruise's Digest, 28, 29. Title Devise, chap. 3. sec. 25. and 28.

But if devisor re-enter, the devise becomes valid, he then being considered as in possession, by relation, from the time his title accrued. *Ibid.*

If a testator, being disseised, devise his interest to the disseisor, it operates

By the common law, if an abator, or intruder, or disseisor, died in peaceable possession, the descent to the heir gave to him a right of possession, and took away from the true owner his right of entry, although such death happened immediately after the wrongful acquisition of the lands; but by the statute of 32 Hen. VIII. c. 33. it is provided, that "the dying seised of any disseisor of and in any lands, &c. having no title therein, shall not be deemed a descent, to take away the entry of the person, or his heir, who had the lawful title of entry at the time of the descent,

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as a release, but he cannot devise the lands to any other person. *Poor* v. *Robinson*, 10 Mass. Rep. 131.

A devise is an intimation of an election not to be disseised. *Jackson* v. *Rogers*, 1 Johns. Cas. 33.

A donee under a parol gift of land leases, and the donor merely permits the lessee to build and enjoy the term, it does not operate as a disseisin unless by election. *Jackson* v. *Rogers*, 1 Johns. Cas. 33.

A person enters on land without title, and the tenants attorn to him; this is not a disseisin or ouster; for the attornment is null and void by the statute. *Jackson* v. *Delancey*, 13 Johns. 553.

The descent of a tenant at sufferance will not toll an entry. *Jackson* v. *Raymond*, 1 Johns. Cas. 88.

The holding over of a tenant for years is no disseisin, except by election, and the bringing an ejectment is not an election to be disseised. *Ibid.*

In *Smartel* v. *Williams*, (Salk. 246.) Holt held, that where mortgagee assigned, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will, the assignment made him tenant at sufferance, but his continuance in possession could never make a disseisin, nor divest the term; otherwise, had the mortgagor died, and his heir entered; for the heir was never tenant at will, and his first entry was tortious; but had the mortgagee entered on the mortgagor, and the mortgagor had re-entered, the re-entry would be tortious.

The same point is ruled in *Gould* v. *Newman*, 6 Mass. Rep. 239.

A corporation cannot acquire a freehold by a disseisin committed by itself. *Weston* v. *Hunt*, 2 Mass. Rep. 502.

Where a disseisor employed an agent to procure a deed from the owner of the land, and the agent took the deed in his own name, the disseisin was not thereby purged, and nothing passed by the deed. *Small* v. *Proctor*, 15 Mass. Rep. 495.

Where a conveyance of land was obtained by fraud, it did not operate such a disseisin as to disable the grantor to devise the land conveyed by such deed. *Smithwick* v. *Jordan*, 15 Mass. Rep. 113.

unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." This statute, however, being a penal one, is construed strictly, and does not extend to the feoffee, or donee of the disseisor, mediate or immediate, and, therefore, the descent in such cases remains as at the common law.(*d*) It is also said, that abators and intruders are not within the statute: but the successors of bodies politic and corporate in cases of disseisin are within its remedy, although the statute speak of him, that at the time of such descent had title of entry, *or his heirs;* for the statute clearly extends to the predecessor, being disseised, and, consequently, without naming his successor, extendeth to him, for he is the person that, at the time of such descent, had title of entry.(*e*)

If there be tenant for life, the reversion in fee, and tenant for life be disseised, and die, and the disseisor afterwards die within five years, the reversioner is within the benefit of the statute, and his entry is not taken away; for, after the death of the tenant for life, it is a continuation of the same disseisin to the reversioner. But if the disseisor had died seised, and the tenant for life had afterwards died, there the descent would have taken away the entry of the reversioner, because there was no continuation of the same disseisin upon the reversioner. The act only continues a right of entry in the disseisee, where a right of entry was *once in him;* but in the last case a right of entry never was in the reversioner, and consequently never having had the right of possession, he is not a disseisee within the statute, to punish the possession of the heir as an actual ouster,

(*d*) Co. Litt. 256.

(*e*) Co Litt. 238. *Wimbish* v. *Tailbois*, Plow. 38. 47.

since the reversioner was never actually ousted either by the original disseisor, or his heir.(*e*)

It is immaterial whether the descent be in the collateral line or lineal;(*f*) but a dying seised of an estate for life, or of a reversion, or remainder, will not take away an entry;(*g*) because, for this purpose, it is essentially necessary that the disseisor should die seised both of the fee or fee-tail and freehold. If, therefore, the disseisor make a lease for his own life, or the life of another, and die seised of the reversion, this descent will not take away the entry, because, although he had the fee, he had not the freehold at the time of his death; but if he make a lease for years and die seised of the reversion, the entry will be taken away, for the fee and freehold are both in him. The law is the same in the case of a remainder, and when the land is extended upon a statute, judgment, or recognizance.(*h*)

It is also necessary, that the descent of the fee and freehold be immediate to bar the entry. Hence, if feme disseisoress take husband, and have issue, and afterwards the husband die, such descent will not take away the entry of the disseisee; because the heir comes not to the fee and freehold at once, the latter having been suspended until the death of the father, who was tenant by the courtesy.(*i*)

To constitute a descent, therefore, which shall take away an entry, it appears, that there must be a dying *seised* in demesne of a corporeal inheritance, either *in fee* or *fee-tail*, that the rightful owner be under no legal disability in the time of the ancestor, and also in those cases

(*e*) Co. Litt. 238. *Wimbish* v. *Tailbois*, Plow. 38. 47.
(*f*) Co. Litt. 339, (*b*).
(*g*) Litt. s. 387, 388.
(*h*) Co Litt. 239, (*b*).
(*i*) Litt. s. 394.

to which the statute of 32 Hen. VIII. c. 33. extends, that the disseisor have five years quiet possession of the lands.

3. By the Statute of Limitations.

By the statute of 21 *Jac.* I. c. 16. s. 1. it is enacted, that "no person shall make any entry upon any lands, &c. but within twenty years next after his right or title shall first descend, or accrue, and, in default thereof, such person so not entering, and his heir, shall be utterly disabled from such entry." Section the second enacts, "that if any person having a right or title of entry, shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, then such person, and his heir, may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act, so as such person, or his heir, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no period after the said ten years."

From the ancient doctrine of *nullum tempus occurrit regi*, the King is not bound by this statute,(*j*)[2] nor are ecclesi-

(*j*) By stat. 9. Geo III. c. 16. the King is disabled from claiming title, (except to liberties and franchises,) unless the same shall accrue within the space of sixty years next before suit or claim, and consequently an adverse possession of lands for sixty years will now be a good title, even against the Crown.

[2] By statute of New-York, (1 Rev. Laws, 184.) no suit can be brought by the people of that state for lands, but within *forty* years after their title accrued, unless the people, or those claiming under them, shall have received the rents and profits thereof, within the said space of forty years.

astical persons within it, because it would be an indirect means of evading the statutes made to prohibit their alienations; but, with these exceptions, the statute applies to all persons, capable of a right to enter; and, therefore, if it appear that there has been a possession by the defendant, or those under whom he holds, for the last twenty years, adverse to the title of the claimant, and that the claimant has not been prevented from prosecuting his claim earlier, by reason of some of the disabilities allowed by the statute, he will be barred of his remedy by ejectment.[3]

It is not easy to define what will constitute an adverse holding of this nature,[4] but it may be safely laid down

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[3] If a person out of possession of land, held adversely, convey the same to another, the deed is void at the common law, and by the act against champerty and maintenance, and the title still remains in the grantor, and he may maintain ejectment. *Williams* v. *Jackson*, 5 Johns. 489. and where demises were laid, both from the grantee and grantor, plaintiff was allowed to recover on the demise of the grantor. *Ibid.*

The same principle has been recognized by the courts in Massachusetts. 5 Mass. Rep. 233. 3 ib. 573. 6 ib. 239. 6 ib. 418. 11 ib. 222. 7 ib. 76. 10 ib. 60. 11 ib. 549. 9 ib. 514. 11 ib. 298.

But the possession of a third person is not of itself conclusive against a conveyance by the grantor, but it must be shown to be adverse. *Commonwealth* v. *Dudley*, 10 Mass. Rep. 403.

Where a conveyance of land was obtained by fraud, it did not operate such a disseisin as to disable the grantor to devise the land so conveyed. *Smithwick* v. *Jordan*, 15 Mass. Rep. 113.

It is an established rule, that a party in possession, claiming title, may purchase in an outstanding title to protect his possession. *Jackson* v. *Smith*, 13 Johns. 229.

[4] To make out an adverse possession, strict proof must be made, not only that the first possession was taken under a claim hostile to the real owner, but that such hostility has existed on the part of the succeeding tenants. It is also requisite that such possession should be marked by definite boundaries. *Brandt* v. *Odgen*, 1 Johns. 158. *Jackson* v. *Waters*, 12 Johns. 368.

Adverse possession is not to be made out by inference, but by clear and positive proof, and every presumption is in favour of possession in subordination

that an adverse possession will be negatived, when the parties claim under the same title, when the possession of one

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to the title of the true owner. *Ibid.* And *Jackson* v. *Sharp*, 9 Johns. 167. *Wickham* v. *Conklin*, 8 Johns. 227.

To constitute an adverse possession, it is not necessary that there should be a rightful title; it must, however, be a possession under claim or colour of title, and exclusive of any other right. *Smith* v. *Burtis*, 9 Johns. 180. *Jackson* v. *Ellis*, 13 Johns. 118.

But where defendant holds by adverse possession under a deed, and shows that he took possession under it, he is not bound to produce the deed at the trial, though called for by the plaintiff. *Jackson* v. *Wheat*, 18 Johns. 44.

A claim, or colour of title, sufficient to destroy all presumption that the defendant was in possession under the plaintiff, or held in obedience to his right, is adverse. But occupation by a mere intruder, will not constitute an adverse possession, nor prevent an alienation by the real owner. *Jackson* v. *Todd*, 2 Caines' Rep. 185.

A grant from the French government is considered as a nullity, and a possession taken under such a grant was held not to be adverse. *Jackson* v. *Waters*, 12 Johns. 367.

Where a person enters without title, and tenants attorn, it is not a disseisin, and the attornment is void, and such entry and attornment will not be considered as the commencement of an adverse possession. *Jackson* v. *Delancey*, 13 Johns. 553.

Whenever the defence of adverse possession is set up, the idea of right is excluded, the fact of possession, and the *quo animo* it was commenced or continued, are the only tests. *Smith* v. *Burtis*, 9 Johns. 180.

Adverse possession is a question exclusively for the jury; and the judge having directed as to that fact, a new trial was granted. *Jackson* v. *Joy*, 9 Johns. 102.

Where a boundary line in a partition deed was in dispute, defendant may protect himself, by showing possession under the line for thirty-eight years. But he protects himself only by his adverse possession, and cannot show a mistake in the deed by parol. *Jackson* v. *Bowen*, 1 Caines' Rep. 358.

A parol agreement for partition, and a corresponding possession for twenty years, is conclusive in ejectment. *Boyd* v. *Graves*, 4 Wheaton, 513. *Ebert* v. *Wood*, 1 Binney, 216.

A *possession fence* made by felling trees, and lapping them one upon another around a lot, will not suffice to make out an adverse possession, when that is the only defence, and to countervail a legal title; but there must be a substantial enclosure, and real occupancy, a *possessio pedis*, definite, positive, and notorious. *Jackson* v. *Schoonmaker*, 2 Johns. 230.

It *seems* to have been decided by the Supreme Court of Pennsylvania, in

party is consistent with the title of the other, when the party claiming title has never in contemplation of law been out of possession, and when the possessor has acknowledged a title in the claimant.

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the case of *Burns* v. *Swift*, (2 Sergeant & Rawle, 439.) that an adverse possession of part of disputed premises, is an adverse possession of the whole.

A possession of a lot of land, commencing, adversely, twenty-five years ago, by a clearing of four or five acres, without showing on what part such clearing was made, and a regular deduction of title, and a priority and continuity of possession down to the defendant, is not such an adverse possession as will bar the plaintiff. *Jackson* v. *Campbell*, 10 Johns. 475.

If defendant, in ejectment, set up the act of limitations, he must stand on his own possession, and cannot call in the possession of one whose title the plaintiff has purchased to assist him. *Cluggage* v. *Duncan*, 1 Sergeant & Rawle, 111.

If a person, recovering in ejectment, neglects to enforce his recovery within the time laid in his demise, his right of entry is gone, and his recovery will not avail, to take the case out of the statute of limitations. *Jackson* v. *Haviland*, 13 Johns. 229.

A. enters into possession, under a lease in fee, in 1775, and gives the land to B. by parol, who continues in possession (except during the war, a year or two) until 1798, and conveys to C., who conveys to D.; it was held a sufficient adverse possession, to bar an ejectment commenced in 1807. *Jackson* v. *Moore*, 13 Johns. 513.

The statute of limitations will not affect the right of a reversioner, or remainderman, if a particular estate existed at the time the adverse possession began, because the right of entry does not then exist. *Jackson* v. *Schoonmaker*, 4 Johns. 390. *Jackson* v. *Sellick*, 8 Johns. 262.

Where owners of adjoining lands have agreed on a fence, variant from the lines in their deeds, avowedly for convenience, but continue to claim according to the true line, neither party acquires a title by possession, merely on account of the fence. *Burrell* v. *Burrell*, 11 Mass. Rep. 294.

If a person takes possession of land, under one tenant in common, he cannot set up his possession as adverse to another tenant in common, though the part so possessed by him, happen to fall to such other joint tenant. *Jackson* v. *Creal* and *Kellogg*, 13 Johns. 116.

But where a man purchases, and takes a deed of a whole lot, supposing that he obtained a title to the whole, though it turn out that the grantor owned but one-ninth, still the possession, under such deed, is adverse as to the other proprietors, and the grantee will be deemed to have entered as sole owner of the whole lot. *Jackson* v. *Smith*, 13 Johns. 406.

First, where the parties claim under the same title.

As if a man seised of certain land in fee have issue two sons, and die seised, and the younger son enter by abatement into the land, the statute will not operate against the elder son; for when the younger son so abates into the land after the death of his father, before any entry made by the elder son, the law intends that he entered, claiming as heir to his father, by which title the elder son also claims.(*k*) So, also, if the defendant should make title under the sister of the lessor of the plaintiff, and prove that she had enjoyed the estate above twenty years, and that he had entered as heir to her, the court would not regard it, because her possession would be construed to be by courtesy, and not to make a disherison, but, by licence, to preserve the possession of the brother, and, therefore, not within the intent of the statute; though, if the brother be once in actual possession, and ousted by his sister, it would, it seems, be otherwise, for then her entry could not possibly be construed to be to preserve his possession.(*l*)

Secondly, where the possession of one party is consistent with the title of the other.

Thus, where, by a marriage settlement, a certain copyhold estate of the wife was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife, the husband was admitted to the lands, pursuant to the *equitable* title, acquired by the settlement, it was held that if he had had no other title than the admission, a possession by him for twenty

(*k*) Co. Litt. s. 396. *Sharrington* v. *Strotton*, Plow. 298, 306.
(*l*) B. N. P. 102. Co. Litt. 242, (*b*).

years would have barred the heir-at-law of the wife; but as it appeared that there was a custom in the manor for the husband to hold the lands for his life, in the nature of a tenant by the courtesy, *and this without any admittance after the death of the wife*, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband, within twenty years after the husband's death, though more than twenty years after the death of the wife.(*m*)

And although one third part of the premises had been settled, many years before the marriage, upon a third person for life, and the steward of the manor, appointed by the heir-at-law and her husband, had constantly debited himself with the receipt of two-thirds of the rent for the husband, on account of his wife, and the remaining one-third for the annuitant; yet, as no surrender had been made to the trustees of the annuitant, it was held, that such payment to him must be taken to be with the consent of the person entitled by law to the whole premises, so as to do away the notion of adverse possession by the husband of that third, distinct from his possession of the other two-thirds, as tenant by the courtesy after the wife's death.

So, also, where a copyholder, with the licence of the lord, leased the copyhold lands for forty years, with a proviso for re-entry, if the rent should be in arrear, and made a will, devising such copyhold lands to A., and died, twenty years of the lease being then unexpired, and the heir-at-law received the rent from the lessee, from the time of the death

(*m*) *Doe*, d. *Milner*, v. *Brightwen*, 10 East, 588.

of the copyholder until the expiration of the lease, and for ten years afterwards, when the devisee brought an action of ejectment; it was holden, that the devisee was not barred of this remedy by the statute of limitations, although more than twenty years had elapsed from the time of the death of the testator, and the forfeiture of the lease, by non-payment of rent to the devisee; for, until the termination of the lease, the devisee had no right to enter, except for the forfeiture; and although he might have entered by reason of the forfeiture, yet he was not bound to do so.(*n*)

So, also, where the rents, issues, and profits of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustees, such possession, &c. being consistent with, and secured to, the *cestui que trust*, by the terms of the trust-deed, the receipt was held not to be adverse to the title of the trustees, so as to bar their ejectment against the grantees of the *cestui que trust*, brought after the twenty years.(*o*) And, indeed, as the *cestui que trust* is a tenant at will (*p*) to the trustees, and his possession is the possession of the trustees, the statute will never operate between trustee and *cestui que trust*, except in very particular cases; although it seems, that if a *cestui que trust* sell or devise the estate, and the vendee or devisee obtain possession of the title deeds, and enter, and do no act recognizing the trustee's title, the statute will operate from the time of such entry.(*q*)[5]

(*n*) *Doe*, d. *Cook*, v. *Danvers*, 7 East, 299.

(*o*) *Keane*, d. Lord *Byron*, v. *Deardon*, 8 East, 248.

(*p*) *Gree* v. *Rolle*, Ld. Raym. 716.

(*q*) *Vide Sugden's Vendors and Purchasers*, 2 Edit. 241.

[5] As long as a trust subsists, the right of a *cestui que trust* cannot be bar-

In like manner the payment of interest upon a mortgage will prevent the statute from running against the mortgagee, although he may not have been in possession of the lands for upwards of twenty years, because such possession is consistent with the original agreement of the parties.(*r*)

It seems as yet a very unsettled point, whether an encroachment upon the waste adjoining to the demised premises, by a lessee, and uninterrupted possession thereof by him for twenty years, shall give to the lessee a possessory right thereto, or whether he shall be deemed to have enclosed the waste, in right of the demised premises, for the benefit of the lessor after the expiration of the term. Lord *Kenyon*, C. J., *Lee*, C. J., and *Thompson*, B., have held that the encroachment belongs to the lessee, whilst, on the other hand, *Heath*, J., *Buller*, J., *Perryn*, B., and *Graham*, B., have held that the landlord is entitled to it.(*s*)

But, at all events, it seems clear, that such possession will be adverse to the rights of the commoners, and, indeed, to the lord himself, excepting as landlord at the expiration of the lease.(*t*)

(*r*) *Hatcher* v. *Fineux*, Lord Raym. 740.

(*s*) *Doe*, d. *Colclough*, v. *Mulliner*, 1 Esp. 460. *Creach* v. *Wilmot*, 2 Taunt. 160, (*in notis.*) *Doe*, d. *Challnor*, v. *Davies*, 1 Esp. 461. *Bryan*, d. *Child*, v. *Winwood*, 1 Taunt. 208.

(*t*) *Creach* v. *Wilmot*, 2 Taunt. 160, (*in notis.*)

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red by the length of time, during which he has been out of possession. 3 Johns. Chan. Rep. 216. *Decouche* v. *Savetier*.

Trusts are not strictly within the statute of limitations, but equity has wisely adopted the principle of the act. *Wallace* v. *Duffield*, 2 Serjeant & Rawle's Reports, 527.

Possession of the *cestui que trust*, is not adverse to the title of the trustee. *Smith* v. *King*, 16 East, 283.

It should, however, be observed, that although twenty years peaceable possession will undoubtedly be a good title against the lord, *qua* lord, if the possession were, in the first instance, taken in defiance of him, and no acknowledgment at any time afterwards made, yet, that if the possession be at first by the lord's permission, or the party subsequently make an acknowledgment that the lands were originally so taken, the statute will never run against the lord; for the possession of a tenant at will, for ever so many years, is no disseisin.(*u*)[6]

Thirdly, an adverse possession will be negatived when the party claiming title has never, in contemplation of law, been out of possession.

Thus, when *A.* devised lands to *B.*, and his heirs, and died, and *B.* died, and the heir of *B.*, and a stranger entered and took the profits for twenty years, upon ejectment brought by the devisee of the heir of *B.* against the stranger, it was held that this perception of the rents and profits by the stranger was not adverse to the devisee's title; because, when two men are in possession, the law adjudges it to be the possession of him who hath the right: the lessor of the plaintiff, and the defendant, were not tenants in common, for the defendant was a mere stranger; and, though he took

(*u*) B. N. P. 104.

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[6] A purchaser at sheriff's sale, becomes *quasi* tenant, and is not presumed to hold adversely. *Jackson* v. *Graham*, 3 Caines' Rep. 188.

The possession of a defendant after a sale, under an execution, can in no sense be deemed adverse to the purchaser, for he is *quasi* tenant at will, until an actual disseisin, or disclaimer, on his part. *Jackson* v. *Sternbergh*, 1 Johns. Cas. 153.

a moiety of the profits, that would not make him a tenant in common; for a man cannot disseise another of an undivided moiety, as he may of such a number of acres.(*v*)

From the principle that the possession of one joint tenant, parcener, or tenant in common, is *prima facie* the possession of his companion also,(*w*) it follows, that the possession of the one can never be considered as adverse to the title of the other, unless it be attended by circumstances demonstrative of an adverse intent; or, in other words, whenever one joint tenant, tenant in common, or parcener, is in possession, his fellow is, in *contemplation of law*, in possession also; and it is necessary to prove *an actual ouster*, to rebut this presumption.[7]

Some ambiguity, indeed, seems formerly to have prevail-

(*v*) *Reading* v. *Rawsterne*, Ld. Raym. 829. v. *Dale*, Hob. 120. *Doe*, d. *Barnet*, v. *Keen*, 7 T. R. 386.

(*w*) *Ford* v. *Gray*, Salk. 285. *Smales*

[7] Where A. was tenant in common of a lot, with eight others, and conveyed the whole lot to B., (stating himself to be the owner of the whole,) and B. conveyed the whole lot to C., who entered into possession, it was held, that the doctrine relative to the possession of tenants in common did not apply, and that the possession of C. was adverse as to the whole lot; that deeds, executed by the eight co-tenants to D., subsequent to the conveyance to C., were inoperative and void; and that releases, by the eight co-tenants to A., subsequent to their deeds to D., enured to the benefit of C. *Jackson* v. *Smith*, 13 Johns. 406.

A person who has entered, by permission of one tenant in common, cannot (a partition having been made) set up a title adverse to the other co-tenant. *Jackson* v. *Creal* and *Kellogg*, 13 Johns. 116.

Where adverse possession is relied on, plaintiff may show that defendant entered, claiming to be tenant in common with the plaintiff, without being obliged to admit the fact, that defendant was, in fact, a tenant in common with plaintiff. *Smith* v. *Burtis*, 9 Johns. 174.

od, as to the meaning of the word *actual ouster*, as though it signified some act accompanied by real force;(*x*) but it is now clear, that an actual ouster may be inferred from circumstances, which circumstances are matter of evidence to be left to the jury. Thus, thirty-six years sole and uninterrupted possession by one tenant in common, without any account to, demand made, or claim set up by, his companion, was held to be sufficient ground for the jury to presume an actual ouster of the co-tenant, and they did so presume.(*y*)

So, also, if upon demand by the co-tenant of his moiety, the other refuse to pay, and deny his title, saying he claims the whole, and will not pay, and continue in possession, such possession is adverse, and ouster enough.(*z*) And, in like manner, where there were two joint tenants of a lease for years, and one bade the other go out of the house, and he went out accordingly, this was held to be an actual ouster.(*a*)

Upon the same principle, although the entry of one is, generally speaking, the entry of both, yet if he enter *claiming the whole* to himself, it will be an entry adverse to his companion.(*b*) But where there was no circumstance to induce a supposition of an actual ouster, but a bare perception of the profits by one tenant in common for twenty-six years, the possession was held not to be adverse.(*c*) And where a tenant in common levied a fine of the whole premises, and afterwards took all the rents and profits for

(*x*) *Fairclaim*, d. *Fowler*, v. *Shackleton*, Burr. 2604.

(*y*) *Doe*, d. *Fishar*, v. *Prosser*, Cowp. 217.

(*z*) *Doe*, d. *Fishar*, v. *Prosser*, Cowp. 217. *Doe*, d. *Hellings*, v. *Bird*, 11 East, 49.

(*a*) Vin. Ab. v. 14. 512.

(*b*) Vin. Ab. 14. 512.

(*c*) *Fairclaim*, d. *Fowler*, v. *Shackleton*, 5 Burr. 2604.

four or five years, but it did not appear that he held adversely at the time of levying the fine, it was held that such fine and receipt were not sufficient evidence of an ouster of his companion.(*d*)

If, however, in cases of joint tenancy, &c. there be sufficient evidence of an actual ouster, the statute will run as in other cases.

Upon the principles here established, the possession of one heir in gavelkind is not the possession of the other, if he enter with an adverse intent to oust the other.(*e*)

Fourthly, when the possessor has acknowledged a title in the claimant.

Thus, where a lease for a long term had been granted, by the lord of the manor, to the rector, in which the lessee covenanted for himself, his executors, and assigns, to pay, during the continuance of the term, a certain annual rent, and also all the tithe straw of wheat and rye within the parish, and the lessee and his assigns (the succeeding rectors) continued in possession for twenty years and upwards after the expiration of the term, without payment of rent, but during that twenty years suffered the heir of the lessor to take the tithe of the wheat and rye straw; it was held, that such sufferance was evidence of an agreement between the lessor and lessee, or their heirs and assigns respectively, that the lessee, or his assigns, should continue his possession, if the lessor, and his heirs, were permitted to receive

(*d*) *Peaceable*, d. *Hornblower*, v. *Read*, 1 East, 568, 574. *Sed vide Stoury* v. *Windsor*, 2 Atk. 630, 632.

(*e*) *Davenport* v. *Tyrrell*, Black. 675.

the tithe as before, and that, consequently, there was no adverse holding in the assignee of the lessee.(*f*)[8]

(*f*) *Roe*, d. *Pellat*, v. *Ferrars*, 1 Bos. and Pull. 542.

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[8] The repeated application of the defendant to the plaintiff, to purchase the premises, affords a strong presumption that he came in possession under the plaintiff. *Jackson* v. *Croy*, 12 Johns. 427.

Where the defendant's entry was without any claim or colour of title, his possession will be adjudged to be in subservience to the legal owner. The statute will not begin to run until his possession is avowedly adverse. *Jackson* v. *Parker*, 3 Johns. Cas. 124. *Jackson* v. *Sharp*, 9 Johns. 163.

When such person acquires what he considers a good title, and no privity exists between him and the real owner, from that moment his possession becomes adverse. *Jackson* v. *Thomas*, 16 Johns. 293, 301.

A person entering under a lease for three years, and holding over for more than forty years, does not, thereby, gain a possession adverse to his lessor; and a person coming in under the lessee, will be considered as holding under the same title. *Brandter* v. *Marshall*, 1 Caines' Rep. 394.

Where A. went into possession of land, under an agreement made with B., for the purchase, and C. afterwards took possession, under an agreement with A., for the purchase, the possession of C. was held not to be adverse to the title of B. *Jackson* v. *Bard*, 4 Johns. 230.

A. entered into possession of lands without title, and afterwards entered into a contract with T., who covenanted to give him a deed; A. assigned the contract to S., who took possession, and received a deed from T., and afterwards a deed from B., the true owner and patentee. It was held, that the original possession of A., being without title, was to be deemed the possession of B., the patentee, and that the possession of S., under the covenant from A. to S., was not adverse. *Jackson* v. *Sharp*, 9 Johns. 163.

A. enters on land in 1770, and in 1786 receives a deed from his father and mother, which was not acknowledged by the mother, to whom the title belonged by inheritance; it was held, that the acceptance of the deed was sufficient to repel parol evidence, that A. entered adversely to his mother's title, and that had the possession previously been adverse, it ceased to be so on accepting the deed. *Jackson* v. *Sears*, 10 Johns. 435.

Possession of the mortgagor is not adverse to the mortgagee. *Higginson* v. *Mein*, 4 Cranch, 415.

But where more than forty years had elapsed after the execution of a mortgage, and neither the original deed, nor the collateral security, were produced, these circumstances afforded a sufficient presumption that the money had been paid. *Inches* v. *Leonard*, 12 Mass. Rep. 379.

To enable a party to take advantage of the extension of time granted by the second section of this statute, it is necessary that the disability to enter should exist at the time when his title accrued; for if he had the power to enter, but for an instant, no subsequent disability will be sufficient to arrest the operation of the statute.[9] And the principle is the same where a disability, existing at the time of the commencement of the title, is afterwards removed, and a subsequent disability ensues; the statute continuing to run, notwithstanding the second disability. It was once, indeed, endeavoured to distinguish between cases of voluntary and involuntary disability in this respect, and to maintain that an involuntary disability, as insanity, occurring after the statute had begun to run, would suspend its progress, but the argument was overruled, upon the principle that a different construction had always been given to all the statutes of limitations, and that such nice distinctions would be productive of mischief.(*g*)

It was said, by Lord Chancellor *Hardwicke*, that if a man, both of non-sane memory and out of the kingdom, come into the kingdom, and then go out of the kingdom, his non-sane memory continuing, his privilege, as to being out of

(*g*) *Doe*, d. *Duroure*, v. *Jones*, 4 T. Plow. 366. R. 300; *et vide Stowell* v. *Ld. Zouch*,

[9] So, where a title accrued to an infant female, who *afterwards* married, she must commence her ejectment within ten years after coming of age, provided twenty years have elapsed since the death of the person last seised. *Demarest* v. *Wynkoop*, 3 Johns. Chanc. Rep. 129.

If adverse possession begins to run during the life of the ancestor, the infant heir is not protected by disability. *Jackson* v. *Moore*, 13 Johns. 513. *Jackson* v. *Robins*, 15 Johns. 169.

the kingdom, is gone; and his privilege, as to non-sane memory, will begin from the time he returns to his senses.(*h*)

When the ancestor, to whom the right first accrues, dies under a disability, which suspends the operation of the statute, his heir must make his entry within ten years next after his ancestor's death, provided more than twenty years have elapsed from the time of the commencement of the ancestor's title, to the time of the expiration of the ten years.(*i*)

It was once, indeed, contended that the meaning of this second section of the statute was, to allow every person at least twenty years after their title accrued, if there were a continuing disability from the death of the ancestor last seised, and ten years more to the heir of the person dying under a disability, which ten years were in addition to the twenty years allowed by the first clause. But it was justly observed by the court, that if this construction obtained, there was no calculating how far the statute might be carried by parents and children dying under age, or continuing under other disabilities in succession; that the word *death*, in the second clause, meant and referred to *the death of the person to whom the right first accrued*, and was probably introduced in order to obviate the difficulty which had arisen in the case of *Stowell* v. *Lord Zouch*,(*j*) upon the construction of the statute of fines, from the omission of that word; and, that the statute meant that the *heir* of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have *ten*

(*h*) *Sturt* v. *Mellish*, 2 Atk. 610, 614.
(*i*) *Doe*, d. *George*, v. *Jesson*, 6 East, 80.
(*j*) Plow. 366.

years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, notwithstanding the twenty years, from the first accruing of the title to the ancestor, should have before expired.(*k*)[1]

Having thus discussed the general principles of the action, that a claimant in ejectment must have both the legal and possessory title, the particular persons, who, by reason of their estate and interest in the lands, are entitled to this action, must next be considered; remembering always, that a right of entry or possession is supposed to accompany their legal title.

1. Tenant for Years—for Life—in Tail—or in Fee.

It has been said by a learned writer, that a tenant for years cannot before entry maintain an action of trespass, or *ejectment;* because those acts complain of a violation of the possession, and therefore cannot be maintained by any person who has not had an actual possession;(*l*) but this reasoning does not seem applicable to the modern principles of the remedy by ejectment.(*m*)

(*k*) *Doe*, d. *George*, v. *Jesson*, 6 East, 80.

(*l*) 1 Cru. Dig. 248. *et vide* 4 Bac. Ab. 183.

(*m*) *Goodright*, d. *Hare*, v. *Cator*, Doug. 477. 486.

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[1] This question is most ably discussed, and the English and American decisions reviewed, by Chancellor Kent, in *Demarest* v. *Wynkoop*, 3 Johns. Chanc. Rep. 129.

In that case it was decided, that the construction of the statute was the same in equity as at law, and that twenty years possession by a mortgagee, is a bar to the equity of redemption.

2. Mortgagee.

When a person is in possession, under a lease granted by the mortgagor prior to the mortgage, the mortgagee will be bound by it;(*n*) but if the lease be made subsequently to the mortgage, without the privity of the mortgagee, it will be no defence to an ejectment brought by the mortgagee; because the mortgagor has no power to let leases not subject to every circumstance of the mortgage.(*o*) The principle extends also to cases where the party in possession is tenant from year to year to the mortgagor.(*p*)

If the mortgagee assign the mortgage, and the assignee assign to another, the last assignee may maintain ejectment for the mortgaged premises.(*q*)

If there be two several mortgagees of the same lands, the mortgagee who has the legal estate will be entitled to recover in an ejectment against the other mortgagee, although his mortgage be posterior in point of time. As, where a term had been created to attend the inheritance, and the lands were afterwards mortgaged to *A.*, who took no assignment of the term, but had possession of the other title-deeds, and the same lands were subsequently mortgaged to *B.*, who took an assignment of the term, it was held that *B.* might recover the possession against *A.*(*r*)[2]

(*n*) *Doe*, d. *Da Costa*, v. *Wharton*, 8 T. R. 2.

(*o*) *Keech*, d. *Warne*, v. *Hall*, Doug. 21.

(*p*) *Thunder*, d. *Weaver*, v. *Belcher*, 3 East, 449.

(*q*) *Smartle*, v. *Williams*, Salk. 245.

(*r*) *Goodtitle*, d. *Norris*, v. *Morgan*, 1 T. R. 755.

[2] A mortgage not registered has a preference over a subsequent judgment docketed, for the statute provides only for subsequent mortgages, and

3. Lord of a Manor.

When the tenant of copyhold premises has committed an act by which he forfeits his lands, he who is lord at the time

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bona fide purchasers. But should a sale take place under the judgment before the registry, the vendee of the sheriff would stand in the light of a *bona fide* purchaser, and would be protected against the mortgage. *Jackson* v. *Dubois*, 4 Johns. 216.

A mortgage cannot be proved by a recital in a deed, for it may have been released since the deed. *Jackson* v. *Davis*, 18 Johns. 7.

Although a stranger cannot set up a mortgage before foreclosure or entry, the assignee of a mortgage will be protected by it, though no foreclosure of it is shown. *Jackson* v. *Minkler*, 10 Johns. 480.

Where no possession was taken under a mortgage, or interest paid, or steps taken to enforce it, for nineteen years, a jury might presume it satisfied; but the period of nineteen years is only a circumstance on which to found a presumption, and is not of itself a bar. *Jackson* v. *Pratt*, 10 Johns. 381.

Where a creditor, by bond and mortgage, sells, under a judgment on the bond, to a person who has notice of the mortgage, the sale merely passes the equity of redemption, but does not affect the mortgagee's lien on the land. *Jackson* v. *Hull*, 10 Johns. 481.

Where mortgagee has never entered, and no interest paid for twenty years, the mortgage will be presumed satisfied; and where a mortgage was not registered, and it was endeavoured to repel the presumption of payment, by the acknowledgments of subsequent purchasers, the evidence of notice to them, of the existence of the mortgage, must be clear and explicit. *Jackson* v. *Wood*, 12 Johns. 242.

If a legal tender is made of the money due on a bond and mortgage to the mortgagee, or his assignee or attorney, which is refused, the debt remains, but *the land* is discharged from the mortgage. *Jackson* v. *Crafts*, 18 Johns. 110.

And where acts of unfairness and oppression were committed by the auctioneer, at a mortgage sale, it was held to be fraudulent and void, and no title passed to the purchaser. *Ibid.*

A mortgage to several persons, to secure a joint debt, creates a joint tenancy, and the mortgaged estate survives; but if the mortgage be foreclosed, and the estate becomes absolute in the mortgagees, they cease to hold as joint tenants, and become tenants in common. *Goodwin* v. *Richardson*, 11 Mass. Rep. 469.

The assignee of the administrators of a mortgage may maintain ejectment in his own name. *Lessee of Simpson* v. *Ammons*, 1 Binney, 175.

After the condition of a mortgage is performed, mortgagor may maintain ejectment against mortgagee. *Erskine* v. *Townsend*, 2 Mass. Rep. 493.

of the forfeiture committed, may maintain an ejectment for the recovery of them; but this right is confined to the lord for the time being, unless the act of forfeiture destroy the estate, and then the heir of the lord, in whose time it was committed, may also take advantage of it.(*s*)

Where, however, a copyholder, holding of a manor belonging to a bishopric, committed a forfeiture by felling timber during the vacancy of the see, the succeeding bishop was allowed to maintain an ejectment against him.(*t*)

The right of the lord to maintain ejectment against his copyholder, for a forfeiture by committing waste, will not be taken away by an intermediate estate in remainder, between the life estate of the copyholder and the lord's reversion; for if it were, the tenant for life, and remainderman, by combining together, might strip the inheritance of all the timber.(*u*)

(*s*) Wat. Copy. Vol. 1. 324 to 353. (*t*) B. N. P. 107.
Doe, d. *Tarrant*, v. *Hellier*, 3 T. R. 162. (*u*) *Doe*, d. *Folkes*, v. *Clements*, 2 Maul. and Sel. 68.

But it will not lie upon a mere tender of the money, his only relief being in equity. *Hill* v. *Payson*, 3 Mass. Rep. 559.

But see the case of *Jackson* v. *Crafts*, 18 Johns. 110. above cited.

Lands mortgaged cannot be sold under an execution against the mortgagee, before a foreclosure of the equity of redemption. *Jackson* v. *Willard*, 4 Johns. 41.

But in Massachusetts, it seems, lands mortgaged may be taken in execution against the mortgagee. 8 Mass. Rep. 558. In that state, by statute, a mortgagor has three years to redeem, after the lawful entry of the mortgagee, for condition broken, and after a sale of the equity of redemption under execution. Before this statute, it had been decided, that this right of redeeming is not liable to be sold under a second execution, but the whole estate left in the mortgagor is a mere right of pre-emption. *Kellogg* v. *Beers*, 12 Mass. Rep. 387.

When an inclosure has been made from the waste for 12 or 13 years, and seen by the steward of the same lord, from time to time, without objection made, it may be presumed by the jury to have been made by the license of the lord, and an ejectment cannot be maintained by him against the tenant, without a previous notice to throw it up.(*v*)

It has never been expressly decided whether the statute of limitations will run against the lord, in case of a forfeiture by a copyholder, and bar his taking advantage of it after a lapse of twenty years; but, from the language of Lord *Kenyon*, C. J. in the case of *Doe*, d. *Tarrant*, v. *Hellier*, it seems that its provisions would be applicable to this as well as to all other rights of entry.(*w*)

4. COPYHOLDER.

Whilst the ancient practice of the action of ejectment prevailed, it seems to have been holden, that a copyholder could not maintain an ejectment, upon a demise for a longer term than a year, unless the license of the lord were first obtained, or a special custom existed in the manor enabling him to make longer leases: and, in some authorities, it is even doubted, whether an ejectment can in any case be supported by a copyholder.(*x*) But, since the introduction of the modern practice, these objections are wholly obviated, and the common consent rule is now sufficient to enable a copyholder to maintain ejectment.

(*v*) *Doe*, d. *Foley*, v. *Wilson*, 11 East, 56.

(*w*) 3 T. R. 162—172.

(*x*) *Stephens*, v. *Eliot*, Cro. Eliz. 483. *Goodwin* v. *Longhurst*, Cro. Eliz. 535. *Sparks'* case, Cro. Eliz. 676. *Downingham's* case, Owen, 17. *Eastcourt* v. *Weeks*, 1 Lut. 799—803.

As the surrender(*y*) and admittance to copyhold lands make but one conveyance,(*z*) the legal title does not vest in the surrenderee until after admittance: but, when the admittance has been made, the title relates back to the time of the surrender, against all persons but the lord; and, therefore, a surrenderee may recover in ejectment against his surrenderor, or a stranger, upon a demise laid between the times of admittance and surrender, provided the admittance be made before the time of the trial.(*a*)

Ashurst, J. in delivering the judgment of the Court in this case, was of opinion that the surrenderee might maintain ejectment against his surrenderor on such a demise, although not admitted before the trial, because the surrenderor is but *a trustee to his surrenderee*; but it should seem, since the legal estate remains in the surrenderor until the time of admittance, that this doctrine is not applicable to the present principles of the action.(*b*)

(*y*) In the case of *Doe*, d. *Warry*, v. *Miller*, (1 T. R. 393.) it was endeavoured to assimilate to copyhold principles, the practice of the Society of New Inn, in granting out their chambers for lives. It is customary with that society, in such grants, to insert a clause, that the tenant shall not sell or assign, without the license of the society, and for the grantees, when they wish to transfer their interest, to surrender the chambers (upon a proper deed stamp) to the Treasurer and Ancients, to the intent that they shall grant the said chambers to the transferree; which subsequent grant was never in point of fact made, but simply an entry of admittance inserted in the Society's books. It is, therefore, evident, that, after the first surrender, the legal estate always remains in the Treasurer and Ancients, as trustees for the subsequent transferrees respectively, and that the terms *surrender* and *admittance* bear not the slightest resemblance in their meaning, to the surrender, and admittance to copyhold premises.

(*z*) *Roe*, d. *Jefferys*, v. *Hicks*, 2 Wils. 13. 15.

(*a*) *Holdfast*, d. *Woollams*, v. *Clapham*, 1 T. R. 600. *Doe*, d. *Bennington*, v. *Hall*, 16 East, 208.

(*b*) *Doe*, d. *Da Costa*, v. *Wharton*, 8 T. R. 2. B. N. P. 109.

The *heir* to copyhold lands may, however, maintain ejectment before admittance against a stranger who obtains possession of the land ;(*c*) for his title is complete against all the world, except the lord, immediately upon the death of the ancestor.(*d*) But if the lord seize the land, upon the ancestor so dying, and the heir bring an ejectment against him for the seizure, it will be necessary to shew that he has tendered himself to be admitted at the lord's court, or that the lord has dispensed with such tender.(*e*)

Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance, it was holden that her devisee, though afterwards admitted, could not recover in ejectment; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the last surrenderor.(*f*)

5. Lessee of a copyholder.

If a copyholder, without license, make a lease for one year, or with license, make a lease for many years, and the lessee be ejected, he shall not sue in the lord's court by plaint, but shall have an ejectment at the common law; because he has not a customary estate by copy, but a warrantable estate by the rules of common law.(*g*)

6. Widow for her Free-Bench.

(*c*) *Roe*, d. *Jeffereys*, v. *Hicks*, 2 Wils. 28.

(*d*) *Rex* v. *Rennett*, 2 T. R. 197.

(*e*) *Doe*, d. *Burrell*, v. *Bellamy*, 2 Maul. and Sel. 87.

(*f*) *Doe*, d. *Vernon*, v. *Vernon*, 7 East, 8.

(*g*) Co. Copy. s. 5. *Goodwin* v. *Longhurst*, Cro. Eliz. 535.

When there is a custom in a manor, that the widow shall enjoy, during her widowhood, the whole, or part of the customary lands, wherewith her husband died seised, as of free-bench, she may, after challenging her right, and praying to be admitted,(*h*) maintain ejectment for them without admittance, even against the lord; because it is an excrescence, which, by the custom and the law, grows out of the estate.(*i*)

But if the widow's claim be in the nature of dower, an ejectment will not lie before assignment,(*j*) but she must levy a plaint in the nature of a writ of dower, in the lord's court.

7. Guardian in Socage,(*k*) or Testamentary Guardian, appointed pursuant to the statute 12 Car. II. c. 24. s. 8.(*l*)[3]

But a guardian for nurture cannot maintain ejectment, for he cannot make leases for years, either in his own name, or in the name of the infant; because he has only the care of the person, and education of the infant, and has nothing to do with the lands merely in virtue of his office.(*m*)

(*h*) *Doe*, d. *Burrell*, v. *Bellamy*, 2 Maul. and Sel. 87.

(*i*) *Jurdan* v. *Stone*, Hutt. 13. *Howard* v. *Bartlett*, Hob. 181.

(*j*) *Chapman* v. *Sharpe*, 2 Show. 134.

(*k*) Litt. sec. 123, 124. *Wade* v. *Cole*, Ld. Raym. 130.

(*l*) *Bedell* v. *Constable*, Vaugh. 177. *Doe*, d. *Parry*, v. *Hodgson*, 2 Wils. 129.

(*m*) *Ratcliffe's* case, 3 Co. 37.

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[3] A guardian in socage has the custody of the land, and is entitled to the profits in the name of the heirs. He has an interest in the estate, may lease it, avow in his own name, and bring trespass. *Byrne* v. *Van Hoesen*, 5 Johns. 66. 1 Johns. 163. 7 Johns. 158.

8. INFANT.(*n*)

It is difficult to discover any principle upon which both infant and guardian can have the power of maintaining ejectment for the same lands, unless, indeed, the power of the infant be limited to those cases, in which no testamentary guardian has been appointed, and the infant is either above the age of fourteen years, or, being under that age, has had no person to take upon himself the office of guardian in socage. No case, certainly, can be found, in which this distinction has been taken, but it is not inconsistent with the doctrine respecting guardians in socage, and accords most fully with the established principles of the action of ejectment.

9. ASSIGNEE OF A BANKRUPT.(*o*)

As all the bankrupt's property, real and personal, is vested in the assignees by the statute 13 Eliz. c. 7. s. 1, 2. it follows, of course, that they must be invested with all the power necessary to obtain possession of it; and the general assignment gives them a title to all the leaseholds (except for lives) belonging to the bankrupt, whether the same be in his possession at the time of the bankruptcy, or acquired by him afterwards. But with respect to the freehold lands of the bankrupt, they do not pass by such assignment, but must, by the provisions of the statute of Elizabeth, be conveyed by the commissioners by deed indented and enrolled; and until the enrolment, as well as the bargain and sale, is completed, the assignees cannot maintain

(*n*) *Rudston* v. *Yates*, March. 141. *Zouch* v. *Parsons*, Burr. 1794. *Noke* v. *Windham*, Stran. 694. *Maddon*, d. *Baker*, v. *White*, 2 T.R. 159.

(*o*) *Beck*, d. *Hawkins*, v. *Welsh*, 1 1806. Wils. 276.

ejectment. The bargain and sale, also, only affects the lands to which the bankrupt is entitled at the time of its execution: if he acquire any future real estates, there must be a new bargain and sale to vest the legal estate in the assignees.(*p*)

10. Conusee of a Statute-Merchant or Staple,(*q*)

11. Tenant by Elegit.

It is laid down in the case of *Lowthal* v. *Tomkins*,(*r*) that if a tenant by *elegit* desire to obtain *actual* possession of the lands, he must bring an ejectment; for the sheriff, under the writ, delivers only the *legal* possession; which doctrine is recognized by Lord *Kenyon*, C. J., in the case of *Taylor* v. *Cole*;(*s*) but in the case of *Rogers* v. *Pitcher*,(*t*) it is said by *Gibbs*, C. J. "I am aware that it has, in several places, been said, that the tenant in *elegit* cannot obtain possession without an ejectment, but I have always been of a different opinion. There is no case in which a party may maintain ejectment, in which he cannot enter. The ejectment supposes that he has entered; and that the lessor may do it by another, and not enter himself, is not very intelligible. I would not, however, consider the present case as now deciding these points, which I only throw out in answer to the argument that has been used."(*t*)[4]

(*p*) Ex parte *Proudfoot*, 1 Atk. 252. Esp. N. P. 431.
(*q*) Co. Litt. 42. *a*. *Hammond* v. *Wood*, Salk. 563.
(*r*) 2 Eq. Ca. Ab. 380.
(*s*) 3 T. R. 295.
(*t*) 6 Taunt. 202.

[4] A purchaser, under a *fieri facias*, has no right to enter, unless the premises are vacant, but must resort to ejectment. *People* v. *Nelson*, 13 Johns. 340.
A seizure of lands by a sheriff, under a *fieri facias*, does not divest the title

When a tenant in possession claimed under a lease granted prior to the date of the judgment against his lessor,

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of the debtor, until a sale and deed delivered, and purchase money paid. *Catlin* v. *Jackson*, 8 Johns. 520.

A sheriff's deed relates back to the time of sale, though not executed until afterwards *Jackson* v. *Dickenson*, 15 Johns. 309.

No estate passes to the purchaser at sheriff's sale, without a deed, or note in writing, which must specify the lands sold, and who was the purchaser. *Jackson* v. *Catlin*, 2 Johns. 248.

No property passes at a sheriff's sale, except what is ascertained and described at the time. *Jackson* v. *Striker*, 1 Johns Cas. 284.

And a subsequent deed, founded on the antecedent execution and sale, will not pass land, unless included in the description of the premises conveyed by the first deed. *Ibid.*

A sheriff's deed, describing lands, as "*all the lands of the defendants in the Hardenbergh patent*," is void for uncertainty. *Jackson* v. *Rosevelt*, 13 Johns. 97. *Jackson* v. *Delancey*, 13 Johns. 551.

A sale to a *bona fide* purchaser, will not be defeated by error or irregularity in the judgment, or execution, or on the ground that no levy was made until after the return day. *Jackson* v. *Rosevelt*, 13 Johns. 97.

An incorrect return to a *fi. fa.*, by a sheriff, does not affect the title of the purchaser. *Jackson* v. *Sternbergh*, 1 Johns. Cas. 153.

Where a judgment was filed, May 22d, and a *fi. fa.* directed the sheriff to levy of the lands of which defendant was seised on the 2d of May, it was held that this irregularity did not affect the title of a purchaser under the *fi. fa.* *Jackson* v *Davis*, 18 Johns. 7.

In this case there was a mistake by the clerk in filing the record.

A deputy sheriff may sell lands and give deed. *Ibid.*

The recital of the execution in the sheriff's deed is not necessary, and a mistake in the recital is immaterial. *Jackson* v. *Pratt*, 10 Johns. 381.

An execution issuing after a year and a day, without a revival of the judgment, is voidable only at the instance of the party against whom it was issued, and its regularity cannot be questioned in an action by the purchaser under the *fi. fa.* *Jackson* v. *Bartlett*, 8 Johns. 365. 3 Lev. 403. 3 Caines, 273.

The Supreme Court of Pennsylvania has decided, that a purchaser at sheriff's sale, to whom a deed has been made, will hold the land, notwithstanding the judgment be set aside for irregularity. *Lessee of Heister* v. *Fortner*, 2 Binney, 40.

But it appears that the decision was founded on a statute. *Ibid.* 47.

Where land is sold under a *fi. fa.*, and a deed is executed, a levy may be presumed. *Jackson* v. *Shaffer*, 11 Johns. 513.

Parol evidence is inadmissible to show that an execution has been with-

it was held that the tenant by *elegit* could not recover in ejectment; because the lessee's title being prior in point of time, the legal estate was in him.(*u*)

12. Personal Representative.(*v*)

This right is, of course, confined to those lands which the testator, or intestate, held for a term of years; but it is immaterial, whether the ouster be after, or before the death of the testator, or intestate.(*w*)

Personal representatives may recover in ejectment under the statute 29 Car. II. c. 3. s. 12., appropriating estates

(*u*) *Doe*, d. *Da Costa*, v. *Wharton*, 8 T. R. 2.
(*v*) 4 Edw. III. c. 7.
(*w*) *Slade's* case, 4 Co. 92, 95 (*a*) *Doe*, d. *Shore*, v. *Porter*, 3 T.R. 13.

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drawn, and the levy abandoned, in contradiction to the sheriff's deed. *Jackson* v. *Vanderheyden*, 17 Johns. 167. and see *Jackson* v. *Cray*, 12 Johns. 427.

In ejectment by a purchaser at sheriff's sale, he must produce not only the *fi. fa.*, and sheriff's deed, but also an exemplified copy of the judgment. *Jackson* v. *Hasbrouck*, 12 Johns 213.

A person in possession under a contract for a purchase, has an interest in the land which may be sold on execution; the defendant becomes *quasi* tenant to the purchaser; and cannot object that he has no title. *Jackson* v. *Scott*, 18 Johns. 94.

A purchaser under sheriff's sale, of all the right of a mortgagor in possession, is entitled to recover, though the mortgagee has been made co-defendant. *Jackson* v. *Davis*, 18 Johns. 7.

Where plaintiff in a judgment covenanted not to sell in two years, the violation of this covenant is no defence to an ejectment under a sheriff's sale. *Ibid.*

When the body of a defendant is taken in execution, the lien of the judgment on the lands is suspended, and, during his imprisonment, a *fi. fa.* issued upon a junior judgment, will gain priority and bind the lands. *Jackson* v. *Benedict*, 13 Johns. 533.

By a recent statute of New-York, passed April 12th, 1820, a purchaser, at sheriff's sale, is not entitled to a deed until fifteen months after the sale. The statute will be found in Appendix, No. 48.

held *pur autre vie*, where there is no special occupant. But this statute does not extend to copyholds, and, therefore, one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, was not permitted to maintain ejectment.(*x*)

13. Devisee.

Where the devise is of a freehold interest, the devisee may immediately, and without any possession, maintain ejectment for the lands devised;(*y*)[5] but if it be a legacy of a term of years, he must first obtain the assent of the executors to the bequest.(*z*) When, however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor, as well as against a stranger.(*a*)

14. Grantee of a Rent-Charge, having power to enter upon the lands, if the rent be in arrear, and hold them until satisfaction.(*b*)

(*x*) *Zouch*, d. *Forse*, v. *Forse*, 7 East, 186.
(*y*) Co. Litt. 240,(*b*).
(*z*) *Young* v. *Holmes*, Stran. 70.
(*a*) *Doe*, d. Lord *Say and Sele*, v. *Guy*, 3 East, 120.
(*b*) *Jemott* v. *Cowley*, 1 Saund. 112.

[5] It is a general rule of law, that on the death of a devisor, dying seised, the devisee is not seised until an entry is made, unless the tenements devised are vacant, and without an occupant. But, if a stranger in possession acknowledge the title of the devisee, it is equivalent to an actual entry. *Wells* v. *Prince*, 4 Mass. Rep. 64.

If a devisee for life refuse to accept the estate devised, the remainderman thereby acquires an immediate right of entry, but he must enter within twenty years, for after that time he cannot enter during the life of a devisee, but he may enter at any time within twenty years after the death of the devisee for life. *Wells* v. *Prince*, 9 Mass. Rep. 508.

These rights of entry are always taken strictly; and, where a man gave a leasehold estate by will to *B.*, his executors, &c. subject to a rent-charge to his wife during her widowhood, with a power to the *widow* to enter for non-payment of rent, and to enjoy, &c. until the arrears were satisfied, and, in case of the widow's marriage, he willed that *B.* should pay the rent-charge to *C.*, his executors, administrators, and assigns, it was holden that *C.*'s executors, after the widow's marriage, and *C.*'s subsequent death, had no right of entry for non-payment of the rent-charge.(*c*)

15. Assignee of the Reversion, upon a Right of Re-entry for Condition broken.(*d*)

By the common law, no one could take advantage of a condition, or covenant, but the immediate grantor, or his heirs; a principle consistent with the old feudal maxims, but highly injurious to the rights of grantors, when the practice of alienating estates became general, and leases for years a valuable possession. To remedy this evil, it is enacted by the 32 Hen. VIII. c. 34. that the grantees, or assignees of a reversion shall have the same rights and advantages, with respect to the forfeitures of estates, as the heirs of individuals, and the successors of corporations, had until that time solely enjoyed; and this statute is made most general in its operation, by particularly including the grants from the Monarch of those lands, which had then recently become the property of the Crown by the dissolution of the monasteries.

The words of the statute grant the privilege of re-entry

(*c*) *Hassell*, d. *Hodson*, v. *Gouthwaite*, Willes, 500.

(*d*) 32 Hen. VIII. c. 34.

to the assignees " for non-payment of rent, or for doing waste, or *for other forfeiture*;" but these latter words have been limited in their interpretation to " *other forfeiture of the same nature*," and extend to the breach of such conditions only, as are incident to the reversion, or for the benefit of the estate. Thus, the assignee may take advantage of covenants for keeping houses in repair, for making of fences, scouring of ditches, preserving of woods, or such like,(*e*) but not of collateral covenants, as for the payment of a sum in gross, or for the delivery of corn, or wood; and it has upon this principle been doubted, whether the assignee can re-enter, if the lessee break a covenant not to assign without license.(*f*)

The assignee of part of the reversion in all the lands demised, is an assignee within this statute, but the assignee of the reversion in part of the lands is not; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed. If, therefore, *A.* be lessee for years of three acres, with condition of re-entry, and the reversion of all the *three acres* be granted to *B. for life*, or *for years*, *B.* can take advantage of the breach of the condition; but if a reversion of any nature whatsoever, even *in fee*, of *two acres* only, be granted to *B.*, he cannot.(*g*)

A *cestui que use*, and bargainee of the reversion, are within this statute, because they are assignees by act of the party; but it does not extend to persons coming in by act of the law, as the lord by escheat;(*h*) nor to an assignee

(*e*) Co. Litt. 215,(*b*).
(*f*) *Lucas* v. *How*, Sir T. Ray, 250.
(*g*) Co. Litt. 215,(*a*).
(*h*) Co. Litt. 215,(*a*).

by estoppel only;(*i*) nor to one who is in of another's estate; and, therefore, if the reversion, expectant on the determination of the term, be merged in the reversion in fee, the reversion is no longer within the statute.(*j*)

This statute is held not to extend to gifts in tail,(*k*) but copyhold lands are within its intention and equity.(*l*)

16. One having had an adverse Possession for twenty Years.

An adverse possession for twenty years is not only an available defence to the party, whilst he continues in possession, but it gives him (unless affected by some of the exceptive provisions in the statute of limitations(*m*)) a complete possessory right to the lands, and is a sufficient title to enable him to maintain an ejectment, against any person who ousts him after the expiration of the twenty years.(*n*)[6]

(*i*) *Awder* v. *Nokes*, Moore, 419.
(*j*) *Threr* v. *Barton*, Moore, 94. *Chaworth* v. *Philips*, Moore, 876. *Webb* v. *Russell*, 3 T. R. 393. 401.
(*k*) Co. Litt. 215,(*a*).
(*l*) *Glover* v. *Cope*, Carth. 205.
(*m*) Ante, 46.
(*n*) *Stocker* v. *Barney*, Ld. Raym. 741.

[6] A right of entry can also be gained by a prior possession, though short of twenty years. The law, on this subject, is thus laid down by Kent, C. J., in the case of *Smith* v. *Lorillard*, 10 Johns. 356. "That the first possession, "when no evidence of title appears on either side, should be the better evi- "dence of right, seems to be the just and necessary inference of law. The "ejectment is a possessory action, and possession is always presumption of "right, and it stands good until other and stronger evidence destroys that pre- "sumption. This presumption of right every possessor of land has, in the "first instance, and after a continued possession for twenty years, the actual "possession ripens into a right of possession, which will toll an entry. Bu "until the possession of the tenant has thus become matured, it would seem

It seems, also, from a recent decision, that this doctrine holds between the party having had the adverse possession

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"to follow, that if the plaintiff shows a prior possession, and upon which the "defendant entered, without its having been formerly abandoned, as derelict, "the presumption, which arose from the tenant's possession, is transferred to "the prior possession of the plaintiff, and the tenant, to repel that presump- "tion, must show a still prior possession, and so the presumption may be re- "moved from one side to the other, *toties quoties*, until one party or the other "has shown a possession that cannot be overreached, or puts an end to the "doctrine of presumption, founded on a mere possession, by showing a regu- "lar title, or a right of possession." In this case, therefore, it was decided, that a prior possession, under a claim of right, for a less period than twenty years, formed a presumption of title sufficient to put the tenant on his defence; but it must appear, that such prior possession had not been voluntarily relinquished without the *animus revertendi*, and that the subsequent possession of the defendant was acquired by a mere entry, without any lawful right. *Ibid.* and *Truesdale* v. *Jefferies*, 1 Caines' Rep. 190, *in notis. Cro. Eliz.* 437. *Bateman* v. *Allen*, 2 Saund. 3. *Allen* v. *Rivington*. *Woods* v. *Lane*, 2 Sergeant & Rawle, 53. *Jackson* v. *Hazen*, 2 Johns. 22.

But where the plaintiff claims to recover on the ground of prior possession, that possession must be clearly and unequivocally proved, and the payment of taxes, and execution of partition deeds, are not sufficient evidence of actual possession. *Jackson* v. *Myers*, 3 Johns. 388 and 396.

In *Jackson* v. *Dieffendorf*, 3 Johns. 270. it was held, that an undisturbed possession for thirty-eight years, under a mistaken location, is conclusive evidence of title; and although the lessor had been turned out of possession, by a recovery by default in ejectment, still he might recover on the strength of his previous possession; that a recovery in ejectment does not prejudice the right; if the person entering under it has a freehold, he is in as a freeholder; if he has no title, he is in as a trespasser; and if he had no right to the possession, he takes only a naked possession. *Atkyns* v. *Horde*, 1 Burr. 114.

But this doctrine, to the extent as above stated, has been controverted by Chancellor *Kent*, in the Court of Errors of New-York, in the case of *Jackson* v. *Richtmyer*, 16 Johns. 326. "To assert," says he, "that a recovery in eject- "ment was of no manner of efficacy, except to change the possession for a "moment, and that the losing party might instantly turn round, and attack "the victor, by the mere force and presumption of the prior possession, is to "render the action of ejectment perfectly absurd. There never could be a "recovery in ejectment, that did not irresistibly admit, that the lessor of the "plaintiff had a better right than the tenant to the existing possession. A re- "covery in ejectment does not injure the right, as it may be made to appear "afterwards, but it certainly does change the presumption of right, founded "on a mere prior possession short of twenty years."

for twenty years, and the legal owner of the lands, although the party having had the possession afterwards desert the premises, and the right owner peaceably enter thereon.(*o*)

But, if the possession of the party be affected by any of the provisions of the second section of the statute of limitations;(*p*) or, if the lands be the property of the Crown or the Church, the defendant may avail himself thereof, in answer to the claim arising from the adverse possession, without shewing any title in himself. If, indeed, the lands are Crown lands, and the claimant has been ousted by a wrong doer, after an uninterrupted possession for more than twenty years, a grant of them from the Crown will be presumed in his favour, unless the Crown is incapable of making such grant; but if such incapacity exist, a grant of course cannot be presumed; and no possession for less than sixty years will then be sufficient to enable him to maintain an ejectment. And, indeed, as the stat. 9 G. I. c. 16. only bars the *suit* of the Crown, after a continuing adverse possession for sixty years, but does not also give a *title* to the adverse possessor, it may be doubted whether *any* length of possession of Crown lands, not grantable by the Crown, will be a sufficient title to support an ejectment.(*q*)

(*o*) *Doe*, d. *Burrough*, v. *Reade*, 8 East, 353.

(*p*) Ante, 46.

(*q*) *Goodtitle*, d. *Parker*, v. *Baldwin*, 11 East, 488.

And where a party enters under a judgment in ejectment, and then conveys, for a valuable consideration, to a third person, who enters under his deed; such entry and possession afford as high and solemn *prima facie* evidence of right, as can well be exhibited, and higher evidence of title, than a previous naked occupancy, though continued for a number of years. *Jackson* v. *Richtmyer*, in Sup. Court, 13 Johns. 367.

17. CORPORATION AGGREGATE, OR SOLE.

It was formerly doubted, whether an ejectment could be maintained by the King, because an ejectment is for an injury done to the possession, and the King cannot be put out of possession. But this reasoning seems only to apply where the King is made *plaintiff*, and not where he is the *lessor of the plaintiff;* for it is the lessee, and not the lessor, who, by the legal fiction, is supposed to be ousted; and it is held, that where the possession is not *actually* in the King, but in lease to another, there, if a stranger enter on the lessee, he gains possession without taking the reversion out of the Crown, and may have his ejectment to recover the possession, if he be afterwards ousted; because, there is a possession *in pais*, and not in the King, and that possession is not privileged by prerogative. Hence it follows, that the *King's lessee* may likewise have an ejectment to punish the trespasser, and to recover the possession which was taken from him.(*r*)

In cases, however, included in the stat. 8 Hen. VI. 16. and 18 Hen. VI. 6., which prohibit the granting to farm of lands, seised into the King's hands upon inquest before escheators, until such inquest shall be returned in the Chancery or Exchequer, and for a month afterwards, if the King's title in the same be not found of record, and avoid all grants made contrary thereto, the King cannot maintain an ejectment until all the previous requisites are complied with: for, even presuming the right and possession to be in the Crown immediately on the death of the person last seised, the King has no power to grant the same until after office found, and, consequently, he must be con-

(*r*) *Payne's* case, 2 Leon. 205. *Lee* v. *Norris*, Cro. Eliz. 331.

sidered to be himself in possession, and, therefore, unable to give a title to his lessee.(*s*)

18. Rector, or Vicar, for Tithes.(*t*)

The statute which gives this remedy for tithes, includes only lay impropriators, leaving spiritual persons to pursue the old remedy in the Ecclesiastical Court; though the doctrine has since been extended by analogy to tithes in the hands of the clergy.(*u*) But an ejectment for tithes can only be maintained against persons claiming, or pretending to have title thereto, and not against such persons as refuse or deny to set them out, which is called subtraction of tithes:(*v*) nor will it lie where the tithes are not taken in kind, but an annual sum is paid in lieu thereof.(*w*)

A parson cannot maintain ejectment for glebe land after sequestration.(*x*)

19. Trustees.

In all cases, in which the trusts are not executed by the statute of uses, the legal estate vests in the trustees, and, of course, in such cases, they may maintain ejectment.

The principles upon which this doctrine is founded have already been discussed;(*y*) and it, therefore, only remains

(*s*) *Doe*, d. *Hayne*, v. *Redfern*, 12 East, 96.

(*t*) *Camell* v. *Clavering*, Ld. Raym. 789.

(*u*) Co. Litt. 159. *Baldwin* v. *Wine*, Cro. Car. 301.

(*v*) 2 and 3 Edw. VI. c. 13. s. 13.

(*w*) Dyer, 116, (*b*).

(*x*) *Doe*, d, *Grundy*, v. *Clarke*, 3 Camph. 447.

(*y*) Ante, 32, 33.

to consider a few cases, in which the trustees have been held to take, or not to take, the legal estate.

A distinction has been made, between a devise to a person in trust, *to pay over* the rents and profits to another,(*z*) and a devise in trust, *to permit some other person to receive* the rents and profits; the legal estate, in the first case, being held to be vested in the trustee, and, in the latter, in the *cestui que trust;* though, to use the words of Sir *James Mansfield*, C. J. in a recent case, "it seems miraculous, how such a distinction became established; for good sense requires, that in both cases, it should be equally a trust, and that the estate should be executed in the trustee;—for how can a man be said to permit and suffer, who has no estate, and no power to hinder the *cestui que trust* from receiving?"(*a*) It has, indeed, in several cases, been argued, that a devise to trustees to receive the rents and profits, and pay them over, will not vest the legal estate in the trustees, unless something is required of the trustees, which renders it necessary that they should have an interest in the lands, as to pay rates and taxes, &c.; but this doctrine has not yet been sanctioned by any decision of the Courts; though, certainly, it has happened in all the latter cases, that the trustees have been required to do other acts, as well as pay the rents and profits.(*b*)

In cases where it is necessary, for the purposes of the

(*z*) Shep. Touch. 482. 1 Eq. Cas. Ab. 383, 384. *Shapland* v. *Smith*, Brown, Chan. Cas. 75. *Silvester*, d. *Law*, v. *Wilson*, 2 T. R. 444. *Jones* v. *Ld. Say and Sele*, 8 Vin. Ab. 262. *Broughton* v. *Langley*, Salk. 679. S. C. 1 Lut. 814. *Burchett* v. *Durdant*, 2 Vent. 311.

(*a*) *Doe*, d. *Leicester*, v. *Biggs*, 2 Taunt. 109. 113.

(*b*) *Jones* v. Ld. *Say and Sele*, 8 Vin. Ab. 262. *Kenrick* v. Ld *Beauclerk*, 3 B. & P. 175. *Doe*, d. *Hallen*, v. *Ironmonger*, 3 East, 533.

trust, that the trustees should take the legal estate, it will be held to vest in them, though the devise be, that *they suffer and permit the cestui que trust* to receive the rents and profits; as where the trust was, that the trustees should permit a *feme covert* to receive and take the rents and profits, during her natural life, for her sole and separate use, they were held to have the legal estate; such construction being necessary to give legal effect to the testator's intention, to secure the beneficial interest to the separate use of the *feme covert.*(*c*) And where lands were conveyed to trustees, and their heirs, in trust, that the trustees should, with the consent of *A.*, sell the inheritance in fee, and apply the purchase money to certain trusts mentioned in the deed, with a proviso, that the rents, issues, and profits, until the sale of the inheritance should *be received by such person, and for such uses*, as they would have been, if the deed had not been made; it was held, notwithstanding the proviso, that the estate was executed in the trustees immediately, even before *A.* had given his consent to the sale; and that it was not a mere power of sale annexed to the legal estate of the owner.(*d*)

In like manner, where the devise was to *A.*, in trust, to permit and suffer the testator's widow to have, hold, use, occupy, possess, and enjoy, the full, free, and uninterrupted, possession and use of all interest of moneys in the funds, and rents and profits arising from the testator's houses, for her natural life, if she should remain unmarried; and that her receipts for all rents, &c. with the approbation of any one of the trustees, should be good and valid, she providing for, and educating properly, the testator's children, and

(*c*) *Harton* v. *Harton*, 7 T. R. 652. (*d*) *Keene*, d. Lord *Byron*, v. *Deardon*, 8 East, 248.

also paying certain annuities; and in case the widow should marry again, then upon certain other trusts, it was held, that the use was executed in the devisees in trust, and upon this ground, that the testator, having made the approbation of the trustees necessary to the widow's receipts, showed that he did not intend to give her a legal estate; and *Gibbs*, J. said, "The rule has been misconceived. Though an estate be devised to *A.* and his heirs, to the use of *B.* and his heirs, the Courts will not hold it to be an use executed, unless it appears, by the whole will, to be the testator's intent that it should be executed. The Courts will rather say the use is not executed, because the approbation of a trustee is made necessary, than that the approbation of a trustee is not necessary, because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees. 'I leave my 'wife to receive the rents, provided there is always the 'control of one of the trustees upon her receipts.'—The testator, therefore, certainly meant that some control should be exercised,—and what could that control be, except they were to exercise it in the character of trustees?"(*e*)

Where certain *freehold and leasehold* premises were devised to trustees, their heirs, &c. "to *permit and suffer* the testator's wife to receive and take the rents and profits, until his son should attain the age of twenty-one," and the will contained also subsequent devises of other lands to the same trustees, upon trusts clearly not executed by the statute; as, for the payment of debts, raising portions for younger children, &c. and immediately after the last of the different devises, a proviso followed, "that it should be lawful for the trustees, and the survivor, at any time or

(*e*) *Gregory* v. *Henderson*, 4 Taunt. 772.

times, till *all* the said lands, &c. devised to them, *should actually become vested in any other person, or persons, by virtue of the will, or until the same, or any part thereof, should be absolutely sold, as aforesaid, to lease the same, or any part thereof,*" it was holden, that the legal estate in the freehold lands contained in the first devise, vested in the widow, notwithstanding that *leasehold* premises were contained in the same devise, (the legal interest in which, of course, vested in the trustees,) and the subsequent leasing power given by the will; because the leasing power either extended to *none* of the lands contained in the first devise, or to such of them only, as were originally vested in the trustees, (namely, the leaseholds,) " the trustees having no control over the lands in the first devise for *any purposes of the testator's will.*"(*f*)

Where the devise was, that the trustee *should pay unto*, or else, *permit and suffer* the testator's niece *to receive* the rents, the legal estate was held to be in the niece, because the words, " to permit and suffer," came last; and, in a will, the last words prevail, though in a deed the first.(*g*)

In a case, where the devise was, " I give and bequeath *my real estates, lands, &c.* and also my personal estate, &c. to *A. B.*, upon trust, to the intent, that the said *A. B.*, his heirs, &c. shall first dispose of my personal estate, or so much thereof as shall be sufficient for that purpose, in payment of my debts, &c. *and as to all my real estates, wheresoever and whatsoever, subject to my debts, and such charge or charges as I may now, or at any time or times hereafter,*

(*f*) *Knight*, d. *Phillips*, v. *Smith*, 12 East, 455.

(*g*) *Doe*, d. *Leicester*, v. *Biggs*, 2 Taunt. 109. *Mansfield*, C. J., in delivering the judgment of the Court in this case, said, the reason they assigned for their decision was given for want of a better.

think proper to make, I give, devise, and bequeath, the same to C. D., *for the term of his natural life*, with remainder to *E. F.*, &c." it was holden, that the legal estate was vested in *C. D.*, because an intention, that the trustees should pay the debts, was not apparent on the face of the will, and, therefore, there was no reason for giving the legal estate to the trustees.(*h*)

As the statute of uses mentions only such persons as are *seised* to the use of others, it has been held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed;* and, therefore, when only a term of years is created, whatever the nature of the trusts may be, the statute does not execute the uses, but the legal estate always vests in the trustees.(*i*)

And when a term of this kind is created, it does not cease when the trusts are satisfied, unless there is a proviso to that effect in the deed creating the term; and, therefore, when the deed contains no such proviso, the legal estate, however ancient the term may be, and notwithstanding it may have been assigned to attend the inheritance, will remain outstanding in the trustees, or their representatives, until it be surrendered to the party beneficially interested, or merge in a larger estate.(*j*)

Copyhold estates, also, are not comprehended within the statute of uses; because, a transmutation of possession, by the sole operation of the statute, without the concurrence or permission of the lord, would be an infringement of the

(*h*) *Kenrick* v. *Beauclerk*, 3 B. & P. 175.

(*i*) *Dillon* v. *Fraine*, Poph. 70. 76. Dyer, 369. Jenk. 244.

(*j*) *Vide Sugden's Vendors and Purchasers*, 3d Edit. 263. 293.

lord's rights, and would tend to his prejudice; and, therefore, if a copyhold be surrendered to *A.*, to the use of *B.*, the legal estate will not be transferred to *B.*, though he would be entitled, in equity, to the rents and profits, and to call upon *A.*, for a surrender of the estate.(*k*)

It seems to have been held, in the case of *Roe*, d. *Ebrall*, v. *Lowe*,(*l*) that a *bona fide* lease, made by an equitable tenant in tail, will prevent the trustees, in whom the legal estate is vested, from recovering in ejectment against the lessee; although, if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred. But, from the more recent decisions, this principle seems to have been much shaken, and it is now very doubtful whether, in any case, a lease from the *cestui que trust* can be set up against the trustee, without the aid of a court of equity.(*m*)

The principles upon which the case of *Goodtitle*, d. *Estwick*, v. *Way*, was decided, namely, that trustees of a term to satisfy creditors *not having notice of an agreement for a lease before the grant of the term*, may maintain an ejectment against the tenant in possession under the agreement, because, the lessors of the plaintiff were not *clearly and unequivocally* trustees for the defendant, have, likewise, been since overruled; and, it now seems, that an agreement for a lease, made before the creation of a trust, will in no case, after a proper notice to quit, bar the recovery of the trustees in ejectment.(*n*)

To obviate the inconveniences which may, at times

(*k*) Co. Cop. s. 54. Gilb. Ten. 182.
(*l*) 1 H. Blk. 446
(*m*) *Baker* v. *Mellish*, 10 Vez. Jr. 544.
(*n*) 1 T. R. 735.

arise, when an ejectment is brought by a *cestui que trust*, from the operation of the salutary maxim, that the legal title must prevail, as affecting his situation with his trustees, the jury will, in particular cases, be permitted to presume, that a regular surrender has been made by the trustees of their estate; thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action. Thus, a surrender will be presumed, if the purposes of the trust-estate have been satisfied;(*o*) or if the beneficial occupation of the estate by the possessor, induces a supposition, that a conveyance of the legal estate has been made to the party beneficially interested; or when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance.(*p*) But this presumption will not be made, if the surrender be a breach of the trust; or against the owner of the inheritance who is interested in upholding it;(*q*) or where the title of the party, for whom the presumption is required, is a doubtful equity only, until a court of equity has first declared in favour of the equitable title;(*r*) nor can the presumption be made by the court, where the merits of the case would have warranted such presumption at the trial, if it appear, upon a special verdict, or special case reserved for their opinion, that the trust-estate, though satisfied, is still, in point of fact, outstanding in the trustees.(*s*)

(*o*) *Doe*, d. *Hodson*, v. *Staple*, 2 T. R. 684.

(*p*) *Doe*, d. *Syburn*, v. *Slade*, 4 T. R. 682.

(*q*) *Doe*, d. *Graham*, v. *Scott*, 11 East, 478.

(*r*) *Keene*, d. Lord *Byron*, v. *Deardon*, 8 East, 248.

(*s*) *Goodtitle*, d. *Jones*, v. *Jones*, 7 T. R. 43.

20. Joint Tenant, Coparcener, or Tenant in common, against his companion, on an actual ouster.(*t*)[7]

21. Lunatic.

The ejectment must be brought in the name of the lunatic; for his committee is but a bailiff, and has no interest in the land.(*u*)

(*t*) *Ante*, 53.

(*u*) *Drury* v. *Fitch*, Hutt. 16. *Cocks* v. *Dgrson*, Hob. 215. *Knipe* v. *Palmer*, 2 Wils. 130. *sed vide* 43 Geo. III. c. 75.

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[7] A tenant in common may maintain ejectment against his co-tenant, though no actual ouster be proved. Per *Spencer*, J. *Shepard* v. *Ryers*, 15 Johns. 501.

If one tenant in common actually oust the other, he shall not be admitted to defend, without confessing lease, entry, and ouster; but if he enter, claiming merely as tenant in common, he will be allowed to enter into a special consent rule, by which he agrees to confess lease and entry, and also ouster, provided an actual ouster be proved on the trial. *Jackson* v. *Denniston*, 4 Johns. 311. *Johnson* v. *Allen*, 12 Mod. 658. *Oates* v. *Brydon*, 3 Bur. 1897. 7 Mod. 39.

The widow of the ancestor is not tenant in common with the heir. *Jackson* v. *O'Donaghy*, 7 Johns. 247.

Where real estate is holden by partners, they hold as tenants in common, and the rules relative to other partnership property do not apply to it. *Coles* v. *Coles*, 15 Johns. 159. *Thornton* v. *Dixon*, 3 Brown's Chanc. Rep. 199. *Balurdin* v. *Shore*, 9 Ves. Jun. 500.

One joint tenant cannot be disseised by a stranger of any particular part of the land, unless all the joint tenants be disseised. *Porter* v. *Hill*, 9 Mass. Rep. 34.

The Supreme Court of Massachusetts have decided, that one tenant in common cannot convey any particular part of the lands to a stranger, so as to enable him to maintain partition for such portion, against the other tenants. *Bartlett* v. *Harlow*, 12 Mass. Rep. 348.

One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied by any act amounting to an ouster, or giving notice to the co-tenant, that his possession is adverse, cannot be construed into an adverse possession. *M'Clung* v. *Ross*, 5 Wheaton, 124.

22. And to these, we may add, that an award, under a submission to arbitration, will give a good title on which to maintain this action; for, although the award cannot have the operation of conveying the land, there is no reason why the defendant may not conclude himself, by his own agreement, from disputing the title of the lessor of the plaintiff in ejectment. The parties consent, that the award of an arbitrator, chosen by themselves, shall be conclusive, as to the right of the land in controversy between them; and this is sufficient to bind them in the action of ejectment.(*v*)[8]—[9]

(*v*) *Doe*, d. *Morris*, v. *Rosser*, 3 East, 15.

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[8] Where an award settles the boundaries of land, it is sufficient to enable the party to whom the land is awarded, to maintain ejectment. *Sellick* v. *Adams*, 15 Johns. 197. *Jackson* v. *De Long*, 9 Johns. 43.

An award of lands to one of the parties, will estop the other from setting up title to the land awarded. *Shepard* v. *Ryers*, 15 Johns. 497.

The Supreme Court of Massachusetts have, however, decided, that when the owners of adjoining lands agree, in writing, to have certain lines run by a surveyor, whose doings should be decisive, the agreement and survey did not operate to pass the land, and did not preclude the party from showing, that his land extended beyond the line established by the surveyor. *Whitney* v. *Holmes*, 15 Mass. Rep. 152.

[9] To these it may be added, that a fine, and five years non-claim, are conclusive evidence of title; and a fine alone is sufficient to support an ejectment against a person entering during the five years, without title. *Jackson* v. *Smith*, 13 Johns. 426.

CHAPTER IV.

OF THE CASES WHICH REQUIRE AN ACTUAL ENTRY UPON THE LAND BEFORE EJECTMENT BROUGHT.

WHEN an entry is required, only to complete the claimant's title, as when a power is reserved to him to re-enter for the breach of any condition of a lease, or grant, the common consent rule will be sufficient to enable him to maintain ejectment, without any actual entry upon the lands in dispute; but when the entry is requisite to rebut the defendant's title, an actual entry upon them must be made, before the action can be supported.(*w*) Such, at least, is the principle laid down by Lord *Mansfield;* but, the application of the latter part of it is now limited to cases where fines with proclamations have been levied; for in all other cases the common consent rule to confess entry is sufficient; and it may be doubted, whether the necessity of an actual entry, even when a fine with proclamations has been levied, does not arise from the construction given to the words of the statute of fines,(*x*) rather than from the general principle above mentioned. By that statute, it is enacted, that, when a fine is levied with proclamations, persons wishing to avoid such fine, must pursue their title, claim, or interest, by way of *action*, or *lawful entry*, within five years next after their title, claim, or interest, shall accrue; or (provided at such time they be under any legal disability) within

(*w*) *Per* Lord *Mansfield*, C. J., *in Goodright*, d. *Hare*, v. *Cater*, Doug. 477—84.

(*x*) 4 Hen. VII. c. 24.

five years next, after such disability shall cease; and, as the action of ejectment was not used, at the time of the enactment of this statute, for the trial of titles, the word *action* in it has been interpreted to extend to *real actions* only, and not to comprehend the remedy by ejectment. When, therefore, a forfeiture is committed by the levying of a fine with proclamations, and the reversioner does not resort to a real action, it becomes necessary for him, if he mean to take advantage of the forfeiture, to have recourse to the other method pointed out by the statute, that is to say, to make a *lawful entry* upon the land; and, having made the *lawful entry*, and thereby avoided the fine, an ejectment will afterwards lie for the recovery of the forfeited lands, in the same manner as if the tenant had forfeited his estate, by the breach of any condition annexed to his grant.

This seems to be the true principle upon which an actual entry is deemed necessary, when a fine with proclamations has been levied; and it is sanctioned by all the modern decisions, although a different doctrine was formerly maintained. In 1703, it was declared by all the judges, (*Price*, B. excepted,) that, *in case of a fine*, there must be an actual entry; and the two first decisions which are extant after this declaration, interpret the maxim to extend to fines *generally*, whether with or without proclamations; and consider the necessity of an entry, to arise from the puissance of a fine at common law, and not from the provisions of the statute of fines.(*y*)[1]

(*y*) *Berrington* v. *Parkhurst*, And. East, 489. *Tapner*, d. *Peckham*, v. 125 S. C. Stran. 1086. S. C. 13 *Merlott*, Willes, 177.

[1] It is settled, by repeated decisions for near a century, that the confession of lease, entry, and ouster, is sufficient to maintain an ejectment for a condition broken; and that an actual entry is not necessary to be shown, in any case, except to avoid a fine. *Jackson* v. *Crysler*, 1 Johns. Cas. 125.

It is somewhat singular, that neither of these cases is noticed in any of the subsequent decisions by which they have been overruled;(z) although, from the superiority of the modern doctrine, the omission can by no means be regretted. It is (to use Lord *Mansfield's* words) "absurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the Court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service."(a)

It was in one case held by the Court of King's Bench, at a trial at bar in ejectment, that where one had made an *actual entry* into the lands *before* any fine was levied, and brought his ejectment *after*, and laid the demise in the declaration before the time of levying the fine, such entry was sufficient to entitle him to a verdict. It is difficult to discover the principle of this decision; for it is evident, by the words of the statute, that an entry *before* the levying of a fine, cannot *avoid* a fine *afterwards* levied; and, if it be said, that the entry and demise, being before the levying of the fine enabled the lessor to shew a good title at the time of the demise, and so prevented the defendant from giving the subsequent fine in evidence, there seems no reason why the same effect should not be produced, by simply laying the demise before the time of levying the fine, without making an actual entry, since it is clear, that an *actual entry* is never necessary but to *avoid* a fine.(b)

(z) *Oates*, d. *Wigfall*, v. *Brydon*, Burr. 1895. *Jenkins*, d. *Harris*, v. *Pritchard*, 2 Wils. 45. *Doe*, d. *Duckett*, v. *Watts*, 9 East, 17.

(a) *Goodright*, d. *Hare*, v. *Cator*, Doug. 477. 85.

(b) *Musgrave*, d. *Hilton*, v. *Shelly*, 1 Wils. 214.

Reversioner may maintain ejectment against tenant for years, who holds over without proving an actual ouster. *Barber* v. *Root*, 10 Mass. Rep. 260.

A fine cannot be avoided by entry, except when the person who seeks to avoid it has a right to enter; for, if the right of entry be taken away by the fine, and a right of action only remain, as if the fine operate as a discontinuance of the estate, a real action must be resorted to. Such is the case when a fine is levied by a tenant in tail.(c) But, if a tenant in tail, first alienate his estate by modes of conveyance, which transfer only the possession, and not the right of possession, as by bargain and sale, lease and release, covenant to stand seised, &c. and the grantee be seised *by virtue of such conveyance*, a fine levied afterwards by the tenant in tail, will not operate as a discontinuance of the estate-tail; but the remainder-man, or reversioner, after the death of the tenant in tail, without issue, may enter, provided his entry be made within five years next after his title accrues.(d)

A fine levied by a tenant for life, operates as a forfeiture of his estate, and divests also the estate of the remainder-man or reversioner, leaving in him only a right of entry. An actual entry must, therefore, be made upon the lands, in order to avoid such fine, before ejectment can be maintained;(e) and this entry may be made, and the ejectment brought, by the party next in remainder, either within five years next after the time when the proclamations upon the fine are completed, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. When, also, there are several remainder-men in succession, the laches of one remainder-man will not prejudice the others, but each remainder-man will be entitled to his right of entry within five years after his title accrues,

(c) *Doe*, d. *Odiarne*, v. *Whitehead*, Burr. 704.

(d) *Seymour's case*, 10 Co. 96. *Ante*, 34, 35.

(e) *Doe*, d. *Compere*, v. *Hicks*, 7 T. R. 433.

notwithstanding the laches of those who have preceded him. But this right can only be executed by the original remainder-men and reversioners, and will not pass by assignment or devise.(*f*)

When a lessee for years makes a feoffment, and then levies a fine to his feoffee, an actual entry is necessary to avoid the fine,(*g*) and the reversioner may then likewise enter within five years next after levying the fine, or within five years next after the expiration of the term.(*h*)

In a late case, where a lessee for years levied a fine with proclamations, after which, his lessor, without entering upon the land, conveyed his reversion to a third person, who brought an ejectment for the forfeiture, Lord *Ellenborough*, C. J., in delivering the judgment of the Court, said, that "they could not find any case which established a difference between tenant for life, and tenant for years, as to the necessity of an entry to avoid their estates, in case of a forfeiture incurred by the levying of a fine, but an entry was necessary against both."(*i*) From the report of this case, it does not clearly appear, whether, by the entry here spoken of, *an actual entry* is intended, or, whether the Court only meant to say, that when a tenant for years levies a fine, his estate does not *ipso facto* cease and determine, but continues until *re-entry*, that is to say, until the reversioner brings an ejectment for the forfeiture.

The latter, seems the more reasonable interpretation,

(*f*) *Goodright*, d. *Fowler*, v. *Forrester*, 8 East, 552.

(*g*) *Hunt* v. *Bourne*, Salk. 339. *and the cases there cited. Pomfret* v. *Windsor*, 2 Ves. 472. 481.

(*h*) *Whaley* v. *Tankard*, 2 Lev. 52. S. C. 1 Vent 241. S. C. Sir T. Raym. 219. *Vide cont. per* Catline, J., *Slowell* v. *Zouch*, Plow. 374,(*a*). *Podger's* case, 9 Co. 105,(*b*).

(*i*) *Fenn*, d. *Mathews*, v. *Smart*, 12 East, 444.

as it is difficult to discover upon that principle an actual entry is more necessary, when a forfeiture is incurred by a tenant for years by levying a fine, than when the forfeiture arises from the breach of any other condition. A fine by a tenant for years, is not within the provisions of the statute of fines. It does not, like the fine of a tenant for life, divest the estate of the reversioner: non-claim does not give effect to it: and, in fact, from the want of a freehold interest in the parties, the fine is wholly inoperative.(*j*) But the necessity of an actual entry, when a fine is levied, arises only from the operation of the statute of fines, and is merely for the purpose of revesting the estate which the fine has divested, and, therefore, must be altogether useless in a case not within the statute, and where the estate of the reversioner is not affected by the fine. In confirmation also of this interpretation, it is laid down by Lord *Kenyon*, C. J., in *Peaceable*, d. *Hornblower*, v. *Read*,(*k*) that if a tenant for years levies a fine, no entry of the landlord is necessary, in order to enable him to maintain ejectment at the end of the term; and, in a recent case, where a lessee, for the life of his lessor, continued in possession after his lessor's death, until his own death, without payment of rent, after which his son took possession, and having kept possession for two years, without payment of rent, levied a fine with proclamations, the Court held, that no entry was necessary to avoid this fine, and Lord *Ellenborough*, C. J., said "it surely needs not much labour to discover, that if the fine operates nothing, it cannot require an entry to avoid it."(*l*)

(*j*) *Shep.* Touch. 14. *and the cases cited in Hunt* v. *Bourne*, 1 Salk. 339. 341, *note* b.

(*k*) 1 East, 568—74.

(*l*) *Doe*, d. *Burrell*, v. *Perkins*, 3 M. & S. 271. *et vide* 1 Saund. 319, (*c*).

As the possession of one joint tenant, parcener, or tenant in common, is, in contemplation of law, the possession of his companion also,(*m*) a fine levied by a joint tenant, parcener, or tenant in common, previously to an actual ouster of his companion, will not operate to divest his companion's estate; and if the party so levying the fine afterwards actually oust his companion, an ejectment may be maintained against him, without an actual entry into the lands.(*n*) In like manner, if one of two tenants in common of a reversion, levy a fine of the whole, an actual entry is not necessary by the other tenant to avoid it.(*o*)

If all the proclamations have not been completed, the fine will only enure as a fine at common law, and no entry will be necessary to avoid it.(*p*) When, also, a tenant for life does not levy, but merely accepts a fine, although such acceptance will create a forfeiture of his estate,(*q*) yet, as the person who levied the fine had not any estate or interest in the lands, at the time of levying the fine, it neither alters the estate of the tenant for life, nor divests the remainder or reversion, and, consequently, no entry is necessary to avoid it.(*r*)

The entry must be made by the party who claims the land, or by some one appointed for him;(*s*) although if the entry be made by a stranger, in the name of the person

(*m*) *Ford* v. *Gray*, Salk. 285. S. C. 6 Mod. 44. *Smales* v. *Dale*, Hob. 120.

(*n*) *Peaceable*, d. *Hornblower*, v. *Read*, 1 East, 568.

(*o*) *Roe*, d. *Truscott*, v. *Elliot*, 1 S. & B. 85.

(*p*) *Doe*, d. *Duckett*, v. *Watts*, 9 East, 17. *sed vide Tapner*, d. *Peckham*, v. *Merlott*, Willes, 177.

(*q*) Co Litt. 252,(*a*).

(*r*) *Podger's* case, 9 Co. 106, (*b*). *Green* v. *Proude*, 1 Mod. 117. S. C. 1 Vent. 257, 8.

(*s*) Co. Litt. 258, (*a*).

who has the right, without any previous command from him, and he afterwards assent to the entry, within five years after the fine is levied, such entry will be sufficient.(*t*) If, however, the assent be not given within the five years, any subsequent assent will not avail; for the statute of fines, being made for the purposes of repose and tranquillity, is always taken strictly.(*u*)

But a guardian by nurture, or in socage, may enter in the name of his ward, without any command or assent, and such entry shall save his right. So, also, the remainder-man, or reversioner, or lord of a copyhold, may enter in the name of the tenant for life, years, or copyholder; or these particular tenants in the name of the reversioner, or remainder-man; or the lord, without any command or assent, on account of the privity between these persons.(*v*) So, likewise, an entry by a *cestui que trust* will be sufficient.(*w*)

When one joint tenant, tenant in common, or parcener, enters generally into lands, it will be sufficient to avoid the effect of a fine as to his companion, from the principle before mentioned, that the possession of one joint tenant, tenant in common, or parcener, is the possession of his companion also.(*x*)

With respect to the mode of making the entry, it must

(*t*) Co. Litt. 245, (*a*). *Fitchet* v. *Adams*, Stran. 1128.

(*u*) *Pollard* v. *Luttrell*, Pop. 108. S. C. Moore, 450. *Audley's* case, Moore, 457. *Podger's* case, 9 Co. 106, (*a*). *Audley* v. *Pollard*, Cro. Eliz. 561.

(*v*) *Podger's* case, 9 Co. 106, (*a*).

(*w*) *Gree* v. *Rolle*, 1 Ld. Raym. 716.

(*x*) Brook. Ab. *Entre Con.* 37. 1 Roll. Abr. 740. *Doe*, d. *Gill*, v. *Pearson*, 6 East, 173.

be upon the lands comprised in the fine; for an entry into other lands, claiming those comprised in the fine, will not be sufficient.(*y*) Thus, where a fine having been levied, the lessor of the plaintiff proved that, at the gate of the house in question, he said to the tenant, that he was heir to the house and land, and forbad him to pay more rent to the defendant, but did not enter into the house when he made the demand, it was agreed that the claim at the gate was not sufficient; but, as it appeared, that there was a court before the house which belonged to it, and that, though the claim was at the gate, *yet that it was on the land*, and not in the street, the claim was holden good.(*z*) But if a person be prevented by force, or violence, from entering on the lands whereof a fine has been levied, he must then make his claim as near the land as he can; which, in that case, will be as effectual, as if he had made an actual entry.(*a*)

When all the lands lie in one county, the party may enter into any part of them, making a declaration in the name of the whole; but if the lands lie in different counties, there must be separate entries for the several counties.(*b*)[2]

(*y*) *Focus* v. *Salisbury*, Hard. 400.
(*z*) Anon. Skin. 412.
(*a*) Litt. s. 419. Co. Litt. 253, (*b*).
(*b*) Litt. s. 417.

[2] An entry into part of a tract of land, claiming the whole, is equivalent to an entry into the whole. *Jackson* v. *Lunn*, 3 Johns. Cas. 115.

There must be an actual entry to avoid a fine, and the demise must be laid after the entry. *Berrington* v. *Parkhurst*, 2 Strange, 1086.

An entry to avoid the statute of limitations, must be an entry for the purpose of taking possession. *Jackson* v. *Schoonmaker*, 4 Johns. 390. 1 Burr. 120. 1 Lutw. 779. 2 Salk. 422. 7 East, 311.

A person having title may enter peaceably, without judgment or suit, and having so entered, his possession enures according to his title. *Jackson* v. *Haviland*, 13 Johns. 235.

The entry must also be made *animo clamandi*, with an intention of claiming the freehold against the fine;(c) and, therefore, when, upon a special verdict in ejectment, it was found that a fine had been levied of the premises, and that the lessor of the plaintiff entered upon the premises, with intent to make the demise in the declaration mentioned, but not for the purpose of avoiding the fine, it was held that such entry was not sufficient.(d)

By the statute 4 Anne, c. 16. s. 16. it is enacted, that no claim or entry, to be made upon any lands, &c. shall be of any force to avoid a fine levied with proclamations according to the statute, or a sufficient entry within the statute of limitations; unless, upon such entry or claim, an action be commenced within one year after the making of such entry or claim, and prosecuted with effect; and, therefore, if the claimant fail in the ejectment brought in consequence of the entry, and have not time to commence a second ejectment within twelve months after the making of the entry, a second entry must be made. But if the actual entry be once made, and the claimant proceed to execution, in an ejectment brought thereon, it seems clear that the fine is totally avoided, and that no second entry will be necessary, if he be afterwards turned out of posses-

(c) *Clarke* v. *Phillips*, 1 Vent. 42. *hurst*, And. 125. S. C. Stran. 1086.
(d) *Berrington*, d. *Dormer*, v. *Park-* S. C. Willes, 327. S. C. 13 East, 489.

The grantor of an estate upon condition, must enter for condition broken, to revest the estate in himself; but when he is in possession already, the estate shall revest in him instantly on breach of the condition. *Lincoln and Kennebeck Bank* v. *Drummond*, 5 Mass. Rep. 321.

On the death of a devisor dying seised, the devisee is not seised until an entry is made; but where the lands are vacant, no entry is necessary. *Wells* v. *Prince*, 4 Mass. Rep. 64.

sion, by the wrong-doer who levied the fine; for the fine being once avoided, shall be void for ever.(*e*)

It has been questioned, whether an actual entry is not necessary to prevent the operation of the statute of limitations;(*f*) but it seems quite clear, from the whole current of authorities, that no entry is necessary, if the action be commenced within the twenty years. If, however, the twenty years be near expiring before an ejectment is brought, it will be prudent to make an actual entry; for it seems, that if an actual entry be made *before* the expiration of the twenty years, an ejectment may be brought at any time within twelve months after the entry, although the twenty years should in the mean while have expired; and, also, that if the lessor of the plaintiff fail in his first ejectment, whether brought within the twenty years or after, he may, from the provisions of the statute of Anne before mentioned, bring a second, provided this second ejectment be likewise brought within a year after the entry is made; whereas, if an ejectment be brought without an actual entry, and the claimant fail in it, and, before another ejectment can be brought, the twenty years expire, he will be entirely barred of this remedy; because the entry which is confessed by the defendant in the first ejectment being only a fictitious entry, and the second ejectment being a *new action*, and not a continuance of the first, it amounts to the same thing as if no entry had been confessed, or no ejectment had been brought until after the expiration of the twenty years.

(*e*) *Stowell* v. *Zouch*, Plowd. 353. 366.

(*f*) *Goodright*, d. *Hare*, v. *Cater*, Doug. 477. 485, (*n.* 1.)

CHAPTER V.

OF THE ACTION OF EJECTMENT AS BETWEEN LANDLORD AND TENANT.

THE modern action of ejectment is not confined in its beneficial effects solely to the trial of disputed titles. It is also the common remedy for landlords, on the determination of tenancies, to recover the possession of their lands from refractory tenants; and it, therefore, properly belongs to this treatise, to inquire into the several relations of landlord and tenant, with regard to this remedy; and to point out the different ways by which the tenant's title to the possession may be determined, and the right of entry in the landlord accrue.

A tenancy may be determined in three several ways; first, by the effluxion of time, or the happening of a particular event; secondly, by a notice, from the landlord to the tenant, to deliver up the possession, or *vice versa;* and, thirdly, by a breach, on the part of the tenant, of any condition of his tenancy, as, by the non-payment of rent, or the non-performance of a covenant.

No comments are necessary upon the first of these divisions: it is sufficient to say generally, that, when the time expires, or the particular event happens, the tenancy is at once determined; and that the landlord may imme-

diately maintain an ejectment to recover his possession, without giving any previous notice to the tenant.(g)[3]

The cases comprised in the second division must be treated of more fully; and, to understand perfectly the principles upon which they have been decided, it will be necessary to give a short history of that species of tenancy, now called a tenancy from year to year.

It has already been observed, that, until the reign of King Henry VII., even a tenant, having a lease of lands for a definite period, had not a full and complete remedy when ousted of his possession. The tenants who, during those times, occupied lands without any specific grant, held them by a far more precarious tenure. A general occupation of lands, that is to say, a holding of the lands of another, without any certain or determinable estate being limited therein, was then considered as a holding at the will and pleasure of the owner of the land; and the tenant was liable to be ejected at any moment, by the simple determination of his landlord's will. But the same enlightened policy, which secured to lessees for years the complete possession of their terms, soon extended itself, also, to those general

(g) *Roe*, d. *Jordan*, v. *Ward*, 1 H. Blk. 97.

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[3] Where tenant for a year holds over, he becomes merely a tenant at sufferance, and is not entitled to notice to quit. *Jackson* v. *M'Leod*, 12 Johns. 182.

But if lessor allows the tenant to remain in possession seventeen years after the expiration of the lease, he cannot recover without notice. *Bedford* v. *M'Etherron*, 2 Serjeant & Rawle, 48.

Where a lease expires, and, by the consent of both parties, the tenant remains in possession, the law implies a tacit renovation of the contract; for, in such a case, there is a prior relation of landlord and tenant, from which a continuance of it may reasonably be presumed. *Jackson* v. *Aldrich*, 13 Johns. 109. 1 Term Rep. 162.

holdings, then called tenancies at will; and, in the reign of King Henry VIII.,(*h*) we find it holden by the courts, that a general occupation should be considered to be an occupation from year to year; and that a person so holding, should not be ejected from his lands, without a reasonable notice from his landlord to relinquish the possession. It was, also, at the same time, settled, that this reasonable notice should be a notice for half a year, expiring at the end of the tenancy; because, otherwise, a notice, reasonable as to duration, might be given, which would, notwithstanding, operate greatly to the prejudice of the tenant, by ejecting him from his lands immediately before the harvest, or other valuable period of the year: and this rule has remained unaltered to the present day, except where a different time is established, either by express agreement, or immemorial custom.

A general occupation of land now, therefore, enures as a tenancy from year to year, determinable, and necessarily determinable,(*i*) by a regular notice to quit; and a holding merely at the will of the landlord, according to the ancient meaning of the term, is an estate unknown in modern times,(*j*) unless when created by express agreement between the parties.(*k*) There is, indeed, an implied modern tenure, denominated a tenancy at will; but it differs materially from the old tenancy so called; and, in truth, is scarcely distinguishable from a mere permissive occupation of the land, independent of the relationship of landlord and tenant. This kind of tenancy arises, when the party is in

(*h*) 13 Hen. VIII. 15, (*b*).

(*i*) *Doe*, d. *Warner*, v. *Brown*, 8 East, 165.

(*j*) *Timmins* v. *Rawlinson*, 3 Burr. 1603—9.

(*k*) *Richardson* v. *Langridge*, 4 Taunt. 128.

possession of the premises with the privity(*l*) and consent of the owner, no express tenancy having been created, and no act having been done by the owner, impliedly acknowledging such party as his tenant. As where he has been let into possession pending a treaty for a purchase or a lease ;(*m*) or under a lease, or which is void ;(*n*) or where, having been tenant for a term which has expired, he continues in possession, negotiating for a new one.(*o*) In all these, and the like cases, it is holden, that the party being lawfully in possession, cannot be ejected, until such lawful possession is determined, either by demand of possession, breaking off the treaty, or otherwise, and the party is called a tenant at will; but, in any of these cases, if the landlord receive rent whilst the party is so in possession, or do any other act amounting to an acknowledgment of a subsisting tenancy, a tenancy from year to year will be created thereby.(*p*)

It is singular, that we do not find in the old authorities any decisions relative to notices to quit, although the practice of giving them has been so long established; but, during the last fifty years, they have become objects of considerable attention to our courts, and there is now no diffi-

(*l*) *Doe*, d. *Knight*, v. *Quigley*, 2 Campb. 505. *Right*, d *Lewis*, v. *Beard*, 13 East, 210. *Hegan* v. *Johnson*, 2 Taunt. 148. *Doe*, d. *Leeson*, v. *Sayer*, 3 Campb. 8.

(*m*) *Goodtitle*, d. *Galloway*, v. *Herbert*, 4 T. R 680. *Doe*, d. *Warner*, v. *Browne*, 8 East, 165.

(*n*) *Doe*, d *Hollingsworth*, v. *Stennett*, 2 Esp. 717.

(*o*) *Denn*, d. *Brune*, v. *Rawlins*, 10 East, 261. *Doe*, d. *Foley*, v. *Wilson*, 11 East, 56.

(*p*) *Doe*, d. *Rigge*, v. *Bell*, 5 T R. 471. *Clayton* v. *Blakey*, 8 T. R. 3. *Thunder*, d. *Weaver*, v. *Belcher*, 3 East, 449, 451. *Doe*, d. *Warner*, v. *Browne*, 8 East, 165.

culty in reducing their requisites to a clear and satisfactory system.[4]

In considering the uses and requisites of the notice to quit, our first inquiry will be directed to those particular

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[4] The Supreme Court of the state of New-York have considered a mere tenant at will as not entitled to notice to quit; but have, of late, inclined to construe all tenancies at will, into tenancies from year to year, for the purpose of notice to quit. In *Jackson* v. *Bradt*, (2 Caines' Rep. 174.) *Kent*, C. J. says, "The reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year. It has frequently been decided by this court, that a mere tenant at will is not entitled to notice to quit."

In the subsequent case of *Jackson* v. *Bryan*, (1 Johns. 322.) it was decided, that where defendant entered on land with owner's permission, and made improvements, but no rent was reserved, after a possession of eighteen years, he was held to be tenant from year to year, and entitled to notice to quit. And *Spencer*, J. says, "That tenancies at will exist nominally, and good policy, as well as common justice, seem to demand, that a holding for an indefinite period should be construed into a tenancy from year to year." *Ibid.* 326.

A mortgagor is entitled to notice to quit, previous to ejectment by the mortgagee; "for," say the court, "he is *quasi* tenant at will, and the notice to quit is a mere matter of practice, which we are at liberty to regulate, even in opposition to the English decisions." *Jackson* v. *Deyo*, 3 Johns. 422. *Jackson* v. *Laughhead*, 2 Johns. 75. *Jackson* v. *Green*, 4 Johns. 186. But a purchaser from the mortgagor is not entitled to notice, for there is no privity between him and the mortgagee. *Jackson* v. *Fuller*, 4 Johns. 215. *Jackson* v. *Chase*, 2 Johns. 84.

The six months advertisement under the statute, is equivalent to six months notice to quit. *Jackson* v. *Lamson*, 17 Johns. 300.

A tenant at will is considered as holding from year to year only for the purpose of a notice to quit; but he has no right to such notice after he determines the will by an act of voluntary waste. *Phillips* v. *Covert*, 7 Johns. 1. Co. Litt. 57, *a*. 5 Co. 13, *a*. Cro. Eliz. 777, 784.

In *Jackson* v. *Wilsey*, 9 Johns. 267. the court seemed inclined to the opinion, that a tenant at will is entitled to notice to quit. They cite *Right* v. *Beard*, 13 East, 211. where Lord *Ellenborough* says, "after lessor had put defendant into possession, he could not, without a demand of the possession, and refusal by the defendant, treat the defendant as a wrong doer and trespasser, as he assumes to do by his declaration in ejectment."

cases in which implied tenancies from year to year are created, although the direct relationship of landlord and tenant does not exist; we shall then consider by whom, and to whom, the notice should be given; then proceed to the form of the notice, and the particular times required in certain cases, for its expiration; and, lastly, point out the means by which the notice may be waived.

No tenancy from year to year exists between a mortgagor and his mortgagee; but the mortgagee may maintain an ejectment against the mortgagor, after the forfeiture of the mortgage, without any previous notice to quit the premises:(*q*) and the principle of this seems to be, not that the mortgagor is tenant at will to the mortgagee after the forfeiture; but that he is then acting as a kind of trustee to the mortgagee, subject to have his authority concluded at the mortgagee's pleasure.(*r*)

The under lessees of the mortgagor are also liable to be ejected without any notice, provided they have been let into possession by the mortgagor, subsequent to the mortgage, and without the privity of the mortgagee, whether they hold as tenants from year to year, or by leases executed after the date of the mortgage. But if a lease be granted by a mortgagor with the concurrence of the mortagee, or if a mortgagee, with knowledge that the mortgagor has granted a lease, encourage the tenant to lay out money upon the premises, it may admit of doubt, whether by such conduct the mortgagee has not confirmed the lease, or so far at least acknowledge the lessee as his tenant, as to render a notice to quit necessary before he can maintain eject-

(*q*) *Birch* v. *Right*, 1 T. R. 378. 83. (*r*) *Moss* v. *Gallimore*, Doug. 279.

ment against him.(*s*) With respect to tenancies created prior to the mortgage, the situation of the mortgagee is of course the same as that of the mortgagor before the mortgage was made.(*t*)

The assignees of the mortgagee have also the like privileges with regard to under-tenants; and the right of an assignee to maintain ejectment without a notice to quit, will not be taken away by a tenancy created prior to the assignment, provided such tenancy commenced subsequently to the date of the mortgage, and continued unacknowledged by the mortgagee.(*u*)

When a party has obtained possession of premises belonging to another, and the owner does any act from which a jury may infer that he intends to acknowledge him as his tenant, a tenancy from year to year is created by such act, and the party will be entitled to a regular notice to quit before he can be ejected. Thus, if a landlord suffer his tenant to continue in possession after the expiration of his lease, and receive rent from him accruing, subsequently to the period of such expiration, he becomes thereby his tenant from year to year, upon the conditions of the original lease. So, also, if a tenant for life make a lease void against the remainder-man, and the lessee enter, and then the tenant for life die, if the remainder-man receive rent from such lessee, accruing subsequently to the death of the tenant for life, such receipt of rent, although it will not amount to a confirmation of the lease, will be sufficient (if the rent

(*s*) *Doe*, d. *Sheppard*, v. *Allen*, 3 Taunt. 78.

(*t*) *Warne*, d. *Keech*, v. *Hall*, Doug. 21. *Thunder*, d. *Weaver*, v. *Belcher*, 3 East, 449. *Birch* v. *Wright*, 1 T. R. 378. *Doe*, d. *Sheppard*, v. *Allen*, 3 Taunt. 78.

(*u*) *Thunder*, d. *Weaver*, v. *Belcher*, 3 East, 449.

be adequate to the value of the premises) (*v*) to establish a tenancy from year to year, upon the terms of it, between the remainder-man and the lessee: and it will be no answer for the remainder-man, that he was ignorant of his title when he received the rent; for it is more reasonable that the remainder-man, who ought to have looked into his title, should be bound by his own act, than that the lessee should be prejudiced by his ignorance.(*w*) In like manner, when a party is let into possession, under a lease void by the statute of frauds,(*x*) payment and receipt of rent will not establish the lease, but it will create a tenancy from year to year, regulated by its covenants and conditions.(*y*) The same principle also holds, if the party come into possession under an agreement or lease, invalid from any other circumstance: as where the party held under an agreement that the lessee should pay a certain rent, and that the lessor should not turn out the lessee so long as the rent was duly paid quarterly, and the lessee did not expose to sale, or sell any article that might be injurious to the lessor in his business, which agreement was invalid, inasmuch as it would (if the tenant complied with the terms thereof) operate as an estate for life, which can only be created by deed as a feoffment or conveyance to uses, yet the lessee having been let into possession, and rent having been paid and received, a tenancy from year to year was created thereby.(*z*)

The same rule prevails when a party is let into possession under a valid agreement for a future lease. As no interest

(*v*) *Doe*, d. *Brune*, v. *Prideaux*, 10 East, 158. *Denn*, d. *Brune*, v. *Rawlins*, 10 East, 261.

(*w*) *Roe*, d. *Jordan*, v. *Ward*, 1 H. Black. 97. *Doe*, d. *Martin*, v. *Watts*, 7 T. R. 83.

(*x*) 29 Car. 2. c. 3.

(*y*) *Doe*, d. *Rigge*, v. *Bell*, 5 T. R. 471. *Clayton* v. *Blakey*, 8 T. R. 3.

(*z*) *Doe*, d. *Warner*, v. *Browne*, 8 East, 165.

in the land passes under such an agreement, no tenancy is created thereby; but the party being let into possession, and rent being paid and received, he becomes, as in the cases already mentioned, a tenant from year to year.

It is frequently difficult to determine, from the words of an instrument, whether it will operate as a lease, or only as an agreement for one; and it may be therefore useful, although the subject does not strictly fall within the limits of this treatise, shortly to consider the points which have arisen in cases of this description.

Formerly, when an agreement contained words of present demise, it was held to amount to an absolute lease, although covenants were added, prospective of some further act to be done, such covenants being construed to be merely in further assurance. As where, before the statute of frauds, a party said, "you shall have a lease of my lands in D. for twenty-one years, paying therefor 10s. *per annum*; make a lease in writing, and I will seal it:" this was held a good lease by parol, and the making of it in writing was but a further assurance.(*a*) So, also, and for a similar reason, the words, *doth let*, in articles of agreement, have been held a present demise, although there was a further covenant, "that a lease should be made and sealed, according to the effect of the articles, before the feast of All Saints next ensuing."(*b*) But a different principle now prevails. The intention of the parties is alone considered, and, to use the words of Lord Ch. B. *Gilbert*, "if the most proper form of words of leasing are made use of, yet if, upon the whole, there appears no such intent, but that the instru-

(*a*) *Maldon's* case, Cro. Eliz. 33. (*b*) *Harrington* v. *Wise*, Cro. Eliz. 486. Noy, 57.

ment is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties, by construing a present lease, when the intent was manifestly otherwise."(*c*) Thus, where articles were drawn up as follows, "A. *doth demise* his close to S., to have it for forty years," and a rent was reserved with a clause of distress, upon which articles a memorandum was also written "that the articles were to be ordered by counsel of both parties, according to the due form of law:" it was ruled, that the articles were not a sufficient lease.(*d*) So where the words were, "A. doth agree to let, and B. agrees to take," for a certain term, at a certain rent, all his estates, the said B. to enter upon the premises *immediately*, and it was further agreed, that leases with the usual covenants should be made and executed by a certain date; the stipulation that leases should be so drawn, was held to show plainly that it was not the intention of the parties that such agreement, although containing words of present demise, should operate as a lease, but only to give the defendant a right to the immediate possession till a lease could be drawn.(*e*) So, also, where, upon an agreement stamp, A. agreed to demise and let certain copyhold premises, for a certain term, at a certain rent, and *further undertook to procure a license to let* such premises, the court held, that the instrument was an executory agreement only, for two reasons; first, because, if it were held to be a lease, a forfeiture would be incurred, which would be contrary to the intent of the parties, who had cautiously guarded against it, by the insertion of a covenant, that a license to lease should be procured from the lord; and, se-

(*c*) Bac. Ab tit. Leases, 164.—*Baxter*, d. *Abrahall*, v. *Browne*, 2 Black. 973—4.

(*d*) *Sturgion* v. *Painter*, Noy, 128.

(*e*) *Goodtitle*, d. *Estwick*, v. *Way*, 1 T. R. 735.

condly, because the stamp was conformable to the nature of an agreement for a lease, and not adapted to an absolute lease.(*f*) So, also, where the words were, "that the said mills he shall hold and enjoy, and I engage to give a lease in, for a certain term," &c. it was ruled, that the words, "shall hold and enjoy," would have operated as words of present demise, if they had not been controlled by those which followed.(*g*) So, also, where the words were, "agreed this day to let my house to B.," for a certain term, "a clause to be added in the lease, to give my son a power," &c. it was considered to be manifest, from the latter words, that a future instrument of demise was contemplated.(*h*) And, in a late case, where, in an instrument which contained words of present demise, there was no direct reference to any future lease, but it appeared, upon taking the whole instrument together, that a future lease was intended, the same rule of construction prevailed. In this latter case the agreement was, "A. agrees to let to B. all his farm, &c. (except three pieces of land,) to hold for twenty-one years, determinable at the end of the first fourteen, at the yearly rent of 26*l.* payable, &c. and at and under all other usual and customary covenants and agreements, as between landlord and tenant where the premises are situate :—A. to allow a proportionate part of the rent, for the three pieces of land above excepted;" and the court held, that it amounted only to an agreement for a lease for the following reasons: because, "at the yearly rent, &c." and, "at and under all usual covenants, &c." is not the language in which a lawyer would introduce into a lease

(*f*) *Doe*, d. *Coore*, v. *Clare*, 2 T. R. 739.

(*g*) *Roe*, d. *Jackson*, v. *Ashburner*, 5 T. R. 163.

(*h*) *Doe*, d. *Bromfield*, v. *Smith*, 6 East, 530.

the technical covenant for further assurance, but contemplates the entire making of an original lease: and because no landlord or tenant of common sense would enter on a term for twenty-one years, without ascertaining what were the terms on the one side and the other, by which they were to be bound for that period, and what was to be the rent apportioned for the excepted premises.(*i*) But where an instrument, upon an agreement stamp, was as follows, "A. agrees to let, and B. agrees to take, all that land, &c. for the term of sixty-one years from Lady-day next, at the yearly rent of 120*l.*; and for and in consideration of a lease to be granted by the said A. for the said term of years, the said B. agrees to expend 2,000*l.* in building, within four years, five houses of a third class of building; and the said A. agrees to grant a lease or leases of the said land, as soon as the said houses are covered in, and the said B. agrees to take such lease or leases, and executes a counterpart, or counterparts thereof:—*this agreement to be considered binding, till one fully prepared can be produced;*" the court held the same to be a lease, considering it to be the intention of the parties, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties; although, when a certain progress was made in the buildings, a more formal lease or leases, in which, perhaps, the premises might be more particularly described, for the convenience of underletting or assigning, might be executed.(*j*) So, also, where the instrument was, "A. agrees to let, and also, upon demand, to execute, to B. a lease of certain lands, and B. agrees to take, and

(*i*) *Morgan*, d. *Dowding*, v. *Bissell*, 3 Taunt. 65.

(*j*) *Poole* v. *Bentley*, 12 East, 168.

upon demand, to execute a counterpart of a lease of the said lands for a certain term, at a certain rent; the lease to contain the usual covenants, and the agreement to bind until the said lease be made and executed," &c. it was held to be a present demise; and that the agreement for a future lease, with further covenants, was for the better security of the parties.(*k*)[5]

(*k*) *Doe*, d. *Walker*, v. *Groves*, 15 East, 244.

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[5] *A memorandum for a lease*, by which A. agrees to let on lease to B. for four years, from a certain day, at a certain rent; then follow certain conditions to be performed by B.; and it is added, that B. agrees to take the premises on said terms and conditions. Held, that this was a lease, and not an agreement for a lease. *Hallett* v. *Wylie*, 3 Johns. 44. and in case of B.'s being kept out of possession, his remedy is ejectment, and not an action on the covenant. *Thornton* v. *Payne*, 5 Johns. 74.

A memorandum of an agreement stated, that A. "hath set, and to farm let, unto B., all that farm, &c. for the rent of, &c. for the use of B. and his wife; the place to be surveyed on or before the 1st June next, and *then the said B. is to take a lease for the same.*" After a possession in B., and payment of rent for fourteen years, this was held to amount to a lease *in præsenti*. *Jackson* v. *Killenback*, 10 Johns. 336.

In this case *Spencer*, J., says, "None of the cases will be found to contradict the position, that where there are apt words of present demise, and to these are superadded a covenant for a further lease, the instrument is to be considered as a lease, and the covenant operating as a covenant for further assurance. The case of *Baxter* v. *Brown*, (2 W. Bl. Rep. 973.) is much in point. The agreement was to grant a lease to Brown of the premises, and they *did thereby set and let to him all*, &c.; provided that the said lease shall be void on the non-payment of rent, &c., and that such *lease shall contain the usual covenants*, &c. The defendant entered in pursuance of such agreement, and paid rent, and it was held by all the judges, that it was clearly a good lease *in præsenti*, with an agreement for a more formal lease in future. We believe that there is no case of a present demise, by apt words, followed by a possession, in which the instrument has not been held to pass an immediate interest."

A covenant in a lease by the lessor, to let the lot at the expiration of the term to the lessee, without mentioning the time for which it was to be let, is altogether void for uncertainty. *Abeel* v. *Radcliff*, 13 Johns. 300.

Nor would Chancery, in this case, interfere to compel a specific performance. 12 Ves. 466. 1 Scho. & Lef. 22. Prec. in Chau. 560. 11 East, 142. 1 Atkyns, 12. 3 Johns. 399. 2 Vern. 415. 1 Ves. Jun. 279.

But to return to the subject of implied tenancies from year to year. In all the cases already mentioned, the mode of acknowledging the tenancy, was by the payment and receipt of rent, which, indeed, is the common evidence in cases of this nature. But the intention to create such a tenancy may be inferred from other circumstances. Thus, where lands descended to an infant, with respect to whom the tenant in possession was a trespasser, and an ejectment was brought on the demise of the infant, and compromised by his attorney upon certain terms, one of which was, that the tenant should attorn to the infant, it was ruled by Lord Kenyon, C. J. at *Nisi Prius*, upon a second ejectment being brought by the infant, when he attained his full age, that although the infant was no party to the agreement, nor had confirmed it, nor received rent since he came of age, yet that such agreement having been entered into, without fraud or collusion, after an ejectment brought at his suit, had, by his acquiescence therein, established the defendant's title as against himself, and created a new tenancy, which could only be determined by a notice to quit.(*l*) So, also, where a *feme covert* lived many years separated from her husband, and during that time received to her separate use the rents of certain lands, which came to her by devise after separation, it was presumed, that she received the rents by her husband's authority, and held, that a notice to quit must be given by him before he could maintain ejectment.(*m*)

But it is necessary that some act of acknowledgment should take place; a mere permission by the owner to oc-

(*l*) *Doe*, d. *Miller*, v. *Noden*, 2 Esp. 528.

(*m*) *Doe*, d. *Leicester*, v. *Biggs*, 1 Taunt. 367.

cupy the premises will not be sufficient, under any circumstances, to create a tenancy requiring a notice to quit, although, in some instances, as we have already remarked, it may create a tenancy at will.(*n*)[6]

(*n*) *Ante*, 103, 104.

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[6] A notice to quit is only necessary where the relation of landlord and tenant subsists. So, where A. conveys to B., and B. to C., and A. remains in possession ten years, no tenancy is created between A. and C., and A. is not entitled to notice to quit from C. The relation of landlord and tenant cannot be presumed from the naked fact, that the defendant continued in possession. The utmost that A. could claim was a tenancy at will between him and B., which will was determined by the conveyance to C. *Jackson* v. *Aldrich*, 13 Johns. 106. *Spencer*, J. dissenting.

Defendant claiming to hold in fee, is not entitled to notice. *Jackson* v. *Deyo*, 3 Johns. 422.

A person holding land by a parol gift (and consequently merely a tenant at will) leases the land, and the donor merely permits the lessee to build, and enjoy the term, a tenancy is not thereby created, and the lessee is not entitled to notice to quit. *Jackson* v. *Rogers*, 1 Johns. Cas. 33. Same case, 2 Caines' Cas. in Error, 314.

A., a lessee, agrees to sell a lease to B., who endorses his name on the lease, and delivers it to B., who pays the purchase money, and agrees to pay the rent in arrear, and to become due, to the lessor. Held, that by this agreement the relation of landlord and tenant was not created, and that B. was not entitled to notice to quit. *Jackson* v. *Kingsley*, 17 Johns. 158.

The better opinion is, that a person entering on land, under a contract for a deed, is not a tenant, nor entitled to notice to quit; but, on the non-performance of his contract, is liable to be turned out as a trespasser. *Smith* v. *Stewart*, 6 Johns. 46.

A person holding adversely, applies to the lessor "to be considered as his "tenant in possession;" there is no tenancy created, and he is not entitled to notice to quit, for defendant merely wishes to be deemed the occupier, having the equitable right of pre-emption. *Jackson* v. *Cuerden*, 2 Johns. Cas. 353.

Where defendant entered adversely, a permission by the lessor of the plaintiff to continue in possession, and a disclaimer by the defendant of holding adversely, will not constitute him tenant, so as to entitle him to notice to quit. *Jackson*, v. *Tyler*, 2 Johns. 444.

A servant or bailiff is not entitled to notice to quit. *Jackson* v. *Sample*, 1 Johns. Cas. 231.

Where lessee takes possession of more land than was contained in his lease, and pays rent for the entire premises, he becomes tenant from year to year

Thus, where the party was let into possession, under an agreement for the purchase of the land, and had possession formally given to him, and paid part of the purchase money, the court held, that the premises might be recovered in ejectment, upon a demand of possession, without any notice to quit.(*o*) And where the vendor of a term, after payment of part of the purchase money, let the purchaser into possession upon an agreement, that he (the purchaser) should have possession of the premises until a given day, paying the reserved rent in the meanwhile, and that if he should not pay the residue of the purchase money on that day, he should forfeit the instalments already paid, and not be entitled to an assignment of the lease; it was held, that the vendor might maintain ejectment without notice to quit, or even demand of possession, the purchaser having failed to complete the purchase at the appointed day.(*p*) So, also, where the party took possession

(*o*) *Right*, d. *Lewis*, v. *Beard*, 13 East, 210.

(*p*) *Doe*, d. *Leeson*, v. *Sayer*, 3 Campb. 8.

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of the whole, and in ejectment for the land not included in the lease, is entitled to notice to quit. *Jackson* v. *Wilsey*, 9 Johns. 267.

Where, by an agreement for the sale of lands, defendant pays part of the purchase money, and takes possession under the agreement, the vendor cannot maintain ejectment without notice to quit. *Jackson* v. *Rowan*, 9 Johns. 330.

And so, where A. was to receive a deed when the whole of the purchase money should be paid, and in the mean time to pay an annual rent, A. having paid rent, becomes a tenant, and is entitled to notice to quit. *Jackson* v. *Niven*, 10 Johns. 335.

Letting land to a person for one year to cultivate on shares makes him a tenant, and not a mere labourer or servant. *Jackson* v. *Brownell*, 1 Johns. 267.

But letting land on shares for a single crop does not amount to a lease of the land, and the owner alone can bring trespass. *Bradish* v. *Schenck*, 8 Johns. 151.

Where land was leased for a number of years, the lessee paying half of the annual crops, it was held, that the interest in the soil passed to the lessee, and that his interest in the crops was exclusive, until he separate and deliver to the lessor his proportion. *Stewart* v. *Doughty*, 9 Johns. 108.

under an agreement, that the owner *would*, by indenture, demise, &c. this was holden to be a mere permissive occupation, until the execution of the indenture.(*q*) And where a man, having obtained possession of a house without the landlord's privity, afterwards entered into a negotiation with him for a lease, which failed, the same rule of construction prevailed.(*r*) In like manner, where a tenant whose lease had expired continued in possession, pending a treaty for a further lease, no tenancy from year to year was created by such possession and negotiation, although it was held, that the landlord had so far thereby acknowledged the defendant as his tenant, as to preclude him from recovering in ejectment, upon a demise anterior to the termination of the treaty.(*s*) When, also, a party is admitted into possession under an invalid lease or agreement, no notice to quit is necessary, until the landlord has acknowledged the tenancy, although, in these cases, also, the party becomes tenant at will to the landlord, and cannot be ejected until the landlord has demanded possession, or in some other manner determined the will.(*t*)

As, however, the implied tenancies from year to year here treated of, depend wholly upon the presumption that it was the intention of the parties to create them, evidence may always be received to rebut such presumption, and shew their real meaning. Thus, where a remainder-man, on the death of the tenant for life, gave notice to the tenant in possession under a lease, granted by the tenant for life, but void against the remainder-man, to quit at the end of

(*q*) *Hegan* v. *Johnson*, 2 Taunt. 148.

(*r*) *Doe*, d. *Knight*, v. *Quigley*, 2 Campb. 505.

(*s*) *Doe*, d. *Hollingsworth*, v. *Stennett*, 2 Esp. 716.

(*t*) *Goodtitle*, d. *Herbert*, v. *Galloway*, 4 T. R. 680. *Clayton* v. *Blakey*, 8 T. R. 3. *Thunder*, d. *Weaver*, v. *Beleher*, 3 East, 449. 451. *Doe*, d. *Warner*, v. *Browne*, 8 East, 165.

six months, and subsequently to the giving of the notice, but before its expiration, received a quarter's rent, accruing after the death of the tenant for life, it was ruled by *Blackstone*, J., that the previous notice to quit rebutted the presumption of a tenancy from year to year, raised by the acceptance of the rent.(*u*) So, also, where the rent is not paid and received, as between landlord and tenant, but upon some other consideration, no tenancy from year to year will be created, nor will a notice to quit be necessary. The payment of a customary rent for copyhold premises has been held to be a payment of this nature; and, if the tenant hold such premises by a title or tenure, which is not supported by the custom of the manor, the receipt of the quit-rent from him by the lord will not create a tenancy from year to year.(*v*)

Upon the same principle, where a tenant in tail received an ancient rent, which was but trifling when compared with the real value of the premises, and which had been reserved under a void lease granted by the tenant for life under a power, upon a special case reserved for the opinion of the Court of King's Bench, they intimated that a jury should be strongly advised not to imply a tenancy from year to year from such payment and receipt,(*w*) although, in a subsequent case upon the same title, they were of opinion that it amounted to an acknowledgment of a tenancy at will.(*x*)

If the tenant set his landlord at defiance, and do any act disclaiming to hold of him as tenant; as, for instance, if he

(*u*) *Sykes*, d. *Murgatoyd*, v. ———, cited in *Right*, d. *Fowler*, v. *Darby*, 1 T. R. 161.

(*v*) *Right*, d. *Dean of Wells*, v. *Bawden*, 3 East, 260.

(*w*) *Roe*, d. *Brune*, v. *Prideaux*, 10 East, 158.

(*x*) *Denn*, d. *Brune*, v. *Rawlins*, 10 East, 261.

attorn to some other person, no notice to quit will be necessary; for, in such case, the landlord may treat him as a trespasser.(*y*)[7] It has, however, been held, that a refusal to pay rent to a devisee under a contested will, accompanied with a declaration, that he (the tenant) was ready to pay the rent to any person who was entitled to receive it, was not a disavowal sufficient to dispense with the necessity of a regular notice.(*z*)

When a tenant from year to year dies, his interest in the land vests in his personal representative, who will continue to hold the premises upon the same terms as the original tenant, and be entitled to the same notice to quit.(*a*) If, however, by the terms of the agreement, no interest vests in the representative, no notice to quit can be necessary. Thus, where *A.* agreed to demise a house to *B.*, during the joint lives of *A.* and *B.*, and *B.* entered in pursuance of the agreement, and, before any lease was executed, died, after which *B.*'s executor took possession of the house; it was held, that *A.* might maintain ejectment against the executor without notice to quit, because the death of *B.* determined his interest, and consequently no interest vested in the executor. The court were also of opinion that the case would have been the same if the lease had been executed.(*b*)

(*y*) B. N. P. 96.

(*z*) *Doe*, d. *Williams*, v. *Pasquali*, Peake's R. 196.

(*a*) *Doe*, d. *Shore*, v. *Porter*, 3 T. R. 13.

(*b*) *Doe*, d. *Bromfield*, v. *Smith*, 6 East, 530.

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[7] A disclaimer by the tenant dispenses with the necessity of notice to quit, but plaintiff must lay his demise subsequent to the time of the disclaimer. *Jackson* v. *Wheeler*, 6 Johns. 272.

In like manner the situation of a tenant from year to year remains unaltered, notwithstanding the death of the landlord, and he will be entitled to his regular notice to quit, whether the lands descend to the heir (although such heir be a minor,(*c*)) or pass to the personal representative, or devisee of the deceased.

We are next to consider the persons by whom, and to whom, the notice to quit is to be given.

The notice to quit must be given by the person interested in the premises, or his authorized agent; and such agent must be clothed with his power to give the notice, at the time when the notice is given; a subsequent assent on the part of the landlord being not sufficient to establish by relation a notice, given in the first instance without his authority. And this principle is founded in reason and good sense, for as the tenant is to act upon the notice at the time it is given to him, it ought to be such an one as he may act upon with security; and if an authority by relation were sufficient, the situation of the tenant must remain doubtful, until the ratification or disavowal of the principal, and he would thereby sustain a manifest injustice.(*d*)

When also two or more persons are interested in the premises, a notice to quit given by one, on behalf of himself and co-tenants, will be valid only as far as his own share is concerned,(*e*) unless he was acting at the time under the authority of the other parties mentioned in the notice. And this rule holds, notwithstanding that the par-

(*c*) *Maddon*, d. *Baker*, v. *White*, 2 T. R. 159.

(*d*) *Right*, d. *Fisher*, v. *Cuthell*, 5 East, 491.

(*e*) *Doe*, d. *Whayman*, v. *Chaplin*, 3 Taunt. 120.

ties are interested as joint tenants; for the rule of law, that every act of one joint tenant, which is for the benefit of his co-joint tenant, shall bind him, does not apply, inasmuch as it cannot be predicated that the determination of a tenancy is for his benefit.(*d*) But where several parties are so interested, as many of them as give notices may recover their respective shares,(*e*) although the others do not join, unless, indeed, by the conditions of the tenancy, it is rendered necessary for all the parties to concur in the notice; in which case a notice given by some of the joint tenants, without the junction or authority of their companions, will be altogether invalid.(*d*)

The steward of a corporation may give a notice to quit, without a power under the corporation seal for so doing; and if the corporation afterwards bring an ejectment upon such notice, it will not be necessary to give any other evidence of his authority, than that he is steward; for the corporation, by bringing the ejectment, shew that they authorize and adopt the act of their officer.(*f*)

A receiver appointed by the Court of Chancery, with a power to let the lands, is an agent sufficiently authorized to give a notice to quit; for if he have an authority to let, he must be taken to have a power of determining the letting, as he must determine for how long he will let.(*g*)

Where a lease contained a proviso, that if either of the parties should be desirous to determine it, in seven or four-

(*d*) *Right*, d. *Fisher*, v. *Cuthell*, 5 East, 491.

(*e*) *Doe*, d. *Whayman*, v. *Chaplin*, 3 Taunt. 120.

(*f*) *Roe*, d. *Dean of Rochester*, v. *Pierce*, 2 Campb. 96.

(*g*) *Wilkinson* v. *Colley*, Burr. 2694. *Doe*, d. *Marsack*, v. *Read*, 12 East, 57. 61.

teen years, it should be lawful for either of them, *his executors, or administrators*, so to do upon twelve months' notice to the other of them, *his heirs, executors, or administrators*, it was considered that the words *executors, or administrators*, were put for *representatives in general*, and that a notice might be given by *an assignee* of either party, or by *the heir, or devisee*, as well as by the parties themselves, their executors, or administrators; because, otherwise, in case of an assignment, or devise, the right of determining the term would be taken from the persons interested in it, and given to a mere stranger, having no interest therein.(*h*) But, where the demise was for twenty-one years, if both parties should so long live, but if either should die before the end of the term, then the heirs and executors, &c. *of the party so dying*, might determine the lease by giving twelve months' notice to quit, it was holden, that this power extended only to the representative *of the party dying*, and that the lease could not be determined by a notice to quit given by the lessor, after the lessee's death, to his representative.(*i*)

When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. The service should invariably be upon the tenant of the party serving the notice, notwithstanding a part, or even the whole of the premises, may have been under-let by him.[8] And in a case where the

(*h*) *Roe*, d. *Bamford*, v. *Hayley*, 12 East, 464.

(*i*) *Legg*, d. *Scott*, v. *Benion*, Willes, 43.

[8] A lessor is not bound to look beyond his immediate lessee, and therefore a notice to quit is sufficient, if served on him, so long as he paid the rent, and the lessor had not recognized the sub-lessee as tenant. *Jackson* v. *Baker*, 10 Johns. 270.

service was upon a relation of the under-tenant *upon the premises*, Lord *Ellenborough*, C. J. ruled the service to be insufficient, although the notice was *addressed* to the original tenant.(*j*) The original tenant is also liable to an ejectment, at the expiration of the notice, for the lands in the possession of his under-tenants, although he may, on his part, have given proper notices to them, and delivered up such parts of the premises as were under his own controul.(*k*)

Where a tenant from year to year had under-let part of the premises, and then gave up to his landlord the part remaining in his own possession, not having received from him a notice to quit, or surrendering such part in the name of the whole, it was held that a notice to quit, from the original landlord to the sub-lessee, for the part so under-let was irregular; and that the sub-lessee could not be ejected without a regular notice from his immediate landlord. And it seems, that if the tenant had surrendered such part in the name of the whole, it would not have varied the case, because the surrender of the lessee would not destroy any interest, which a stranger claiming under him had acquired in the term before such surrender.

When the premises are in the possession of two, or more, as joint tenants, or tenants in common, a written notice to quit, addressed to all, and served upon one only, will be a good notice;(*l*) so also a parol notice given to one co-tenant only will bind his fellow.(*m*)

(*j*) *Doe*, d. *Mitchell*, v *Levi*, M. T. 1811. M. S.

(*k*) *Roe* v. *Wiggs*, 2 N. R. 330. *Pleasant*, d. *Hayton*, v. *Benson*, 14 East, 234.

(*l*) *Doe*, d. *Lord Bradford*, v *Watkins*, 7 East, 551.

(*m*) *Doe*, d *Lord Macartney*, v. *Crick*, 5 Esp. 196.

When a corporation aggregate is the tenant, the notice should be addressed to the corporation, and served upon its officers, and a notice addressed to the officers will not be sufficient.(*n*)

With respect to the mode of serving the notice, it is in all cases advisable, if possible, to deliver the same to the tenant personally; but if personal service cannot be effected, the notice should be left at his usual place of residence, whether the same be situated upon the demised premises, or elsewhere.(*o*)

It is, however, doubtful, from the judgment of *Buller*, J. in the case above cited, whether the delivery of a notice to quit at the dwelling house of the tenant will be a sufficient service, provided the person to whom it is delivered should swear upon the trial, that no intimation thereof had ever been given to the tenant in possession. It is much to be regretted that a point of such general importance to landlords and tenants should not be more clearly settled.

Next of the form of the notice.(*p*)

When the landlord intends to enforce his claim to double value, if the tenant holds over,(*q*) it is necessary that the notice to quit should be in writing; but for the purposes of an ejectment a parol notice is sufficient, unless the notice is required to be in writing by express agreement between

(*n*) *Doe*, d. *Lord Carlisle*, v. *Woodman*, 8 East, 228.

(*o*) *Jones*, d. *Griffiths*, v. *Marsh*, 4 T. R. 464.

(*p*) Appendix, Nos. 1, 2, 3.

(*q*) 4 G. II. c. 28. s. 1.

the parties.(r) It is, however, nevertheless, the general practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes, and renders the evidence certain and correct. It is customary also to address the notice to the tenant in possession; and it is, perhaps, most prudent to adhere to this form, though, if proof can be given that the notice was served personally upon him, it is thereby rendered unnecessary.(s) And where a notice was addressed to the tenant by a wrong Christian name, and the tenant did not return the notice, or object to it, and there was no tenant of the name mentioned in the notice, it was ruled at Nisi Prius to be sufficient.(t)

A subscribing witness to a notice to quit is unnecessary; and it is prudent not to have one, as it may occasion difficulties in the proof of the service, and cannot be of the slightest advantage to the landlord.

Care should be taken that the words of a notice are clear and decisive, without ambiguity, or giving an alternative to the tenant; for, although the courts will reluctantly listen to objections of this nature, yet if the notice be really ambiguous, or optional, it will be sufficient to render it invalid, as far at least as the action of ejectment is concerned.

The notice, however, will not be invalid, unless it con-

(r) *Legg*, d. *Scott*, v. *Benion*, Willes, 43. *Timmins* v *Rowlinson*, 1 W. Blk. 533 *Doe*, d. *Ld. Macartney*, v. *Crick*, 5 Esp. 196. *Roe*, d. *Dean of Rochester*, v. *Pierce*, 2 Campb. 96.

(s) *Doe*, d. *Matthewson*, v. *Wrightman*, 4 Esp. 5.

(t) *Doe*, v. *Spiller*, 6 Esp. 70.

tain a real and *bona fide* option, and not merely an apparent one; for if it appear clearly, from the words of the notice, that the landlord had no other end in view, than that of turning out the tenant, it will be deemed a notice sufficient to found an ejectment upon, notwithstanding an apparent alternative. Thus, the words, "I desire you to quit the possession at Lady-day next of the premises, &c. in your possession, or *I shall insist upon double rent*," have been held to contain no alternative; because the landlord did not mean to offer a new bargain thereby, but only added the latter words as an emphatical way of enforcing the notice, and shewing the tenant the legal consequences of his holding over. It was contended for the tenant, that this could not be the construction of the notice, because the statute of 4 Geo. II. c. 28. does not give double the *rent*, but double the *value*, on holding over; but Lord *Mansfield*, C. J., was of opinion, that the notice, notwithstanding this variance, clearly referred to the statute. It seems, however, that if the words had been "*or else* that you agree to pay double rent," the notice would have been an alternative one.(*u*)

Where the notice was to quit "on the 25th day of March, or 6th day of April next ensuing,"(*v*) and was delivered before new Michaelmas-day, it was held to be a good notice; as being intended to meet an holding commencing either at new, or old Lady-day, and not to give an alternative.(*w*)

(*u*) *Doe*, d. *Matthews*, v. *Jackson*, Doug. 175.

(*v*) In the printed report, this date is stated to be the *eighth* day of April, which, from the reasoning in the case, cannot be correct.—See also *Doe*, d. *Spicer*, v. *Lea*, 11 East, 312.

(*w*) *Doe*, d. *Matthewson*, v. *Wrightman*, 4 Esp. 5.

Upon the same principle, the court will not invalidate a notice, on account of an ambiguity in the wording of it, provided the intention of the notice be sufficiently certain. Thus, an impossible year has been rejected. The notice was given at Michaelmas 1795, to quit at Lady-day, *which will be* in 1795, and was accompanied, at the time of delivery to the tenant, with a declaration, that as he would not agree to the terms proposed for a new lease, he must quit *next* Lady-day, and under these circumstances the notice was considered to be sufficiently certain:(*x*) the court also seemed to be of opinion, that the notice would have been good without the accompanying declaration, the words "*which will be*," manifestly referring to the then next Lady-day.—In like manner, where there was a misdescription of the premises in the notice, which could lead to no mistake, the house being described therein as the *Waterman's* Arms, instead of the *Bricklayer's* Arms, no sign called the Waterman's Arms being in the parish, the notice was deemed a valid one.(*y*)

When a notice is given to quit at Michaelmas, or Lady-day generally, it will not be deemed an ambiguous notice, but considered *prima facie*, as expiring at *new* Michaelmas, or *new* Lady-day, open, however, to explanation, that *old* Michaelmas, or *old* Lady-day, was intended. And if it appear, that the customary holdings where the the lands lie, are from old Michaelmas, or Lady-day, or even that in point of fact, the tenant entered at old Michaelmas, or Lady-day, although no such custom exist, such a notice will be binding upon him.(*z*)

(*x*) *Doe*, d. *Duke of Bedford*, v. *Kightley*, 7 T. R. 63.

(*y*) *Doe*, d. *Cox*, v. ———, 4 Esp. 185.

(*z*) *Furley*, d. *Mayor of Canterbury*, v. *Wood*, 1 Esp. 197. *Doe*, d. *Hinde*, v. *Vince*, 2 Campb. 256.

The notice must include all the premises held under the same demise; for a landlord cannot determine the tenancy as to part of the things demised, and continue it as to the residue. But where the demise was of land and tithes, and the notice was to quit possession of "all that messuage, tenement, or dwelling-house, farm-lands, and premises, with the appurtenances, which you rent of me," it was ruled at *Nisi Prius* that this notice was sufficient to include the tithes; for the tithes being held along with the farm, the notice must have been understood by both parties to apply to both.(*a*)

Fourthly, Of the time when the notice should expire.

Before, however, we enter upon this subject, it may be useful to observe, that certain demises, which have the appearance of tenancies from year to year only, are considered by the courts as conveying to the tenant an indefeasible interest for a certain time, though afterwards liable to be determined by a notice to quit.

Thus, a demise "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least, and not determinable by a notice to quit at the expiration of the first year.(*b*) The same interpretation has also been given to a demise "for a year, and afterwards from year to year;"(*c*) though where the demise was "for twelve months certain, and six months' notice afterwards;" it was held at *Nisi Prius*, that the tenancy might be determined at the expiration of the first twelve months.(*d*)

(*a*) *Doe*, d. *Morgan*, v. *Church*, 3 Campb. 71.

(*b*) *Denn*, d. *Jacklin*, v. *Cartright*, 4 East, 31.

(*c*) *Birch* v. *Wright*, 1 T. R. 378. 80. and the cases there cited.

(*d*) *Thompson* v. *Maberly*, 2 Campb. 573.

Where the demise was to hold for three, six, or nine years, generally, without any stipulation as to the manner in which, or the party by whom, the tenancy might be determined at the end of the third, or sixth year, the tenancy was held to be determinable, at the two earlier periods, at the will of the tenant only, and by a regular notice to quit: and that, as against the landlord, the demise operated as an indefeasible one for nine years.(*e*)

If the produce of the demised lands require two years to come to perfection, as if it be liquorice, madder, &c. a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first, or third year.(*f*) And it was observed by *De Grey*, C. J. in his judgment, that it might deserve to be considered whether, if required by the nature of the soil, or the course of husbandry, a general holding will not always enure as a tenancy for such period, as may be necessary to carry the land through its regular course of cultivation, instead of as a tenancy from year to year; but this doctrine seems very doubtful.

It has before been stated generally, that, by the common law, the notice necessary to be given to a tenant, is a notice for *half a year*, expiring at the end of the current year of his tenancy; and that a notice expiring at any other period will not be sufficient.(*g*) This notice is frequently spoken of in the books, as *a six months' notice;* and the distinction seems to be, that when the tenancy expires at any of the usual feasts, as Michaelmas, Christmas, Lady-day, or Midsummer, the notice must be given prior to, or

(*e*) *Denn* v. *Spurrier*, 3 B. & P. 399.

(*f*) *Roe* v. *Lees*, Black. 1171.

(*g*) *Ante*, 103.

upon, the corresponding feast happening in the middle of the year of the tenancy;(*h*) whilst, if it expire at any other period of the year, the notice must be given six calendar months previous to such expiration.

The notice, when a tenancy commences at any of the usual feasts, may be given to quit at the end of half a year, or of six months from the date of the corresponding feast in the middle of the year, without stating the day when the tenant is to quit, although the intermediate time be not exactly half a year, or six months, from feast to feast being the usual half yearly computation. And, indeed, in a case where the notice was, to quit "on or about the expiration of six *calendar* months from the 29th of September," (the tenancy commencing March 25,) the court ruled the word *calendar* to be surplusage, and held the notice good.(*i*)

It was once contended, that the principle, that a notice to quit must expire at the end of the year of the tenancy, did not extend to houses as well as lands; and that in cases where houses alone were concerned, six months' notice, at any period of the year, would be sufficient; but the court considered that the same inconvenience might arise in the one case as in the other, since the value of houses varies considerably at different periods of the year; and therefore held that the tenant of a house was entitled to the same pri-

(*h*) In a report of a MS. case in Esp. N. P. 460. it is said, that a notice given on the 30*th of September*, being the day after Michaelmas-day, to quit at Lady-day following, was ruled by *Heath*, J. to be a sufficient notice. Some particular circumstances, not noticed by the reporter, must, it is conceived, have occasioned Mr. J. *Heath's* decision, since the principle laid down in the report is in opposition to every authority upon the subject. Probably the tenant entered at old Lady-day.—*Vide Right* v. *Darby*, 1 T. R. 159. *et ante*, 127.

(*i*) *Howard* v. *Wemsley*, 6 Esp. 53. The marginal note in the report of this case is incorrect.

vileges, with respect to the notice to quit, as the occupier of land.(*j*)

It should, however, be observed, that this rule extends, with respect to houses, to those cases only in which the tenancy enures as a tenancy from year to year; and that the notice required will refer to the original letting, and be regulated by the local custom of the district in which the house is situated, whenever it happens that a shorter term than twelve months is intended to be created by the letting, although no particular period be mentioned. This chiefly happens in the case of lodgings; and the custom, for the most part, requires the same space of time for the notice, as the period for which the lodgings were originally taken; as a week's notice when taken by the week, a month's when taken by the month, and so forth.(*k*)

When, also, the custom of the country where the premises are situated, requires, or allows, a notice for a longer, or shorter period, than half a year (as, for instance, the custom of London, by which a tenant, under the yearly rent of 40s. is entitled to a quarter's notice only,)(*l*) the custom will be admitted by the courts;(*m*) but such custom must be strictly proved, and the witnesses must not speak to *opinion*, but *facts*.(*n*) The parties may also, by special agreement, vary the time of the duration of the notice; but the notice must, notwithstanding where the letting is from year to year, expire with the year of the tenancy, unless the agreement also provides some other

(*j*) *Right* v. *Darby*, 1 T. R. 159. *Doe*, d. *Browne*, v. *Wilkinson*, Co. Litt. 270 (*b*), n. 1.

(*k*) *Doe*, d. *Parry*, v. *Hazell*, 1 Esp. 94.

(*l*) *Tyley* v. *Seed*, Skin. 649.

(*m*) *Roe*, d. *Brown*, v *Wilkinson*, Co. Litt. 270(*b*), n. 1.

(*n*) *Roe*, d. *Henderson*, v. *Charnock*, Peake N. P. C. 4.

period for its expiration.(*o*) Where, however, the terms of the agreement are not intended to create a tenancy from year to year, determinable at a quarter's notice, but to empower the parties to put an end to the tenancy at other periods of the year, as well as at its termination, the courts will give effect to it. Thus, a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice ;(*o*) and a demise, where it was agreed " that the tenant was always to be subject to quit at three months' notice,"(*p*) have been held to be demises determinable at the end, although not in the middle of any quarter. But a quarterly reservation of rent is not a circumstance from which an agreement to dispense with a regular notice for six months is to be inferred ; although, where the landlord accepted in such case a three months' notice from his tenant, without expressing either his assent to, or dissent from, such notice, it was ruled at *Nisi Prius* to be presumptive evidence of an agreement, that three months' notice should be sufficient.(*q*)

The notice may be given to quit upon a particular day, or in general terms at the end and expiration of the current year of the tenancy, which shall expire next after the end of one half year from the service of the notice.(*r*) The latter form should always be used when the landlord is ignorant of the period when the tenancy commenced, and is unable to serve the tenant personally ; and, it is also the preferable form, when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant en-

(*o*) *Doe*, d. *Pitcher*, v. *Donovan*, 1 Taunt. 155.

(*p*) *Kemp* v. *Derrett*, 3 Campb. 511.

(*q*) *Shirley* v. *Newman*, 1 Esp. 266.

(*r*) Appendix, No. 1, 2, 3.

tered. If a particular day be mentioned in the notice, it must be the day of the commencement, and not of the conclusion of the tenancy; for the tenant cannot be compelled to quit, whilst his right of possession continues, and this right is not determined, until the year is fully completed. It must also be the *exact* day of such commencement. The next, or any subsequent day, will not be sufficient.(*s*)

The time, when a tenancy from year to year commences and expires, takes its date, in the absence of all other circumstances, from the time when the tenant actually enters upon the demised premises;(*t*) but this general rule may be varied, both as to the commencement and expiration of the tenancy, either by express agreement or legal inference.

When a person is let into possession as a yearly tenant, and afterwards takes a lease of the premises, and continues to hold the land after the lease has expired, the time of the expiration of the tenancy, created by such holding over, will be regulated by the terms of the lease, and not by the time of the original entry. Thus, if a man enters at Lady-day, continues tenant for one or more years, then accepts a lease for a certain term expiring at Michaelmas, and afterwards holds over and pays rent, the notice must be given to quit at Michaelmas, and not at Lady-day.(*u*) And the rule extends to the assignees of the original lessee, and their assigns. Whatever may be the period of the year when they enter upon the demised premises, the time of the expiration

(*s*) *Doe*, d. *Spicer*, v. *Lea*, 11 East, 312.

(*t*) *Kemp* v. *Derrett*, 3 Campb. 511.

(*u*) *Doe*, d. *Spicer*, v. *Lea*, 11 East, 312.

of their tenancies will be the same as if the original lessee had continued in possession; and it seems immaterial whether they come into possession before or after the expiration of the lease.(*v*)

In like manner, when a remainder-man receives rent from a person in possession under a lease, granted by the tenant for life, but void against the remainder-man, and thereby creates a tenancy from year to year, the time at which a notice to quit, given by such remainder-man, must expire, will be regulated by the terms of the lease, and not by the time of the death of the tenant for life.(*w*) As, if the lease be for a certain number of years, to commence on the 5th of April, and the tenant for life die on the 30th of September, the proper period for the expiration of the notice will be the 5th of April.

The principle is the same if the tenant hold under a parole lease, void by the statute of frauds. As, where there was a verbal agreement to hold for seven years, and the tenant was to enter at Lady-day, and quit at Candlemas, it was held that the lease, although void as to its duration, nevertheless regulated the terms of the tenancy in other respects, and that a notice to quit must expire at Candlemas, and not at Lady-day.(*x*)

It may be recollected from these cases, that if there be a lease for years, commencing on one day, and terminat-

(*v*) *Doe*, d. *Castleton*, v. *Samuel*, 5 Esp. 173.

(*w*) *Doe*, d. *Collins*, v. *Weller*, 7 T. R. 478. *Right*, d. *Flower*, v. *Darby*, 1 T. R. 159. *Roe*, d. *Jordan*, v. *Ward*, 1 H. Blk. 97. *Ante*, 107, 108.

(*x*) *Doe*, d. *Rigge*, v. *Bell*, 5 T. R. 471. *Doe*, d. *Peacock*, v. *Raffan*, 6 Esp. 4.

ing on another, as for example, commencing at Lady-day, and terminating at Michaelmas, a tenancy created by the landlord's receipt of rent after the expiration of the lease, will be held to commence at Michaelmas, and to require half a year's notice from Lady-day.

No new tenancy is created by a mere agreement between landlord and tenant, for an increase of rent in the middle of the year of a tenancy; but a notice to quit, given after the receipt of the increased rent, must expire at the time when the tenant originally entered.(*y*)

When a tenant took possession in the middle of a quarter, paid rent from the time of his coming in up to the next quarter day, (Christmas,) and then paid his rent half yearly at Midsummer and Christmas, it was ruled at *Nisi Prius*, that the tenancy commenced from Christmas, and not from the preceding half quarter.(*z*) But where the tenant entered in the middle of a quarter, upon an agreement "to pay rent quarterly, and for the half quarter," it was left to the jury, whether the party was tenant from the quarter day, prior to the time when he entered, or from the succeeding quarter day; and under the direction of Lord *Ellenborough*, C. J. the jury found that the tenancy commenced with the preceding quarter. (*a*)

When the demise is by parol, and in general terms to hold from feast to feast, as from Michaelmas to Michaelmas, it will be a holding from such feast according to the

(*y*) *Doe*, d. *Bedford*, v. *Kendrick*, Warwick Sum. Ass. 1810.—MS.

(*z*) *Doe*, d. *Holcomb*, v. *Johnson*, 6 Esp. 10.

(*a*) *Doe*, d. *Wadmore*, v. *Selwyn*, H. T. 47 Geo. III.—MS.

new style ; unless, by the custom of the country where the lands lie, (which custom may be proved by parol testimony,) such tenancies commence according to the *old style.*(*b*) If, however, the demise be by deed to hold from any particular feast, as "*from the feast of St. Michael's, &c.*" the holding must be taken to be according to the new style. notwithstanding the custom; and this rule prevails, although the tenancy be created by a holding over after the expiration of the lease, and the original entry was according to the old style.(*c*)

Upon the same principle, a notice to quit at Michaelmas generally, *prima facie* means new Michaelmas; but if the tenant entered at old Michaelmas, it will be construed to mean old Michaelmas.(*d*)

A tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise ; and the notice to quit must then be given with reference to the substantial time of entry, that is to say, with reference to the time of entry on the substantial part of the premises demised ; no notice being taken of the time of entry on the other parts, which are auxiliaries only ; though the tenant will be obliged to quit them at the respective times of entry thereon.(*e*)

This substantial time of entry, it has been contended, must be determined by the times when the rent is payable ; but it is holden to depend, either upon the general

(*b*) *Furley*, d. *Mayor of Canterbury*, v. *Wood*, 1 Esp. 198. Run. Eject. 112.

(*c*) *Doe*, d. *Spicer*, v. *Lea*, 11 East, 312.

(*d*) *Doe*, d. *Hinde*, v. *Vince*, 2 Campb. 256.

(*e*) *Doe*, d. *Strickland*, v. *Spence*, 6 East, 120

custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises; and of these facts it is the province of the jury to determine.

As few decisions are to be found on these points, it will be useful to give a concise statement of them.

Where the landlord agreed to let the defendant a farm, to hold the arable land from the 13th of February then next, the pasture from the 5th of April, and the meadow from the 12th of May, at a yearly rent payable at old Michaelmas and old Lady-day, the first payment to be made at Michaelmas then next, it was held to be a tenancy from old-Lady-day to old Lady-day; because the custom of most countries would have required the tenant to have quitted the arable and meadow lands on the 13th of February, and 12th of May, without any special agreement, and a notice to quit at old Lady-day, delivered before old Michaelmas, was held sufficient.(*f*)

So, also, upon a demise of the same nature, namely, that the tenant should enter upon the arable land at Candlemas, and the house and other premises at Lady-day, to which was added a proviso, that the tenant should quit the premises "*according to the times of entry as aforesaid*," it was held by the court, that the proviso made no alteration in the tenancy, so as to require a notice six months before Candlemas, because it merely expressed what the law would otherwise have implied; that the substantial time of entry was at Lady-day, with a privilege to the tenant on the one hand to enter on the arable land before that period,

(*f*) *Doe*, d. *Dagget*, v. *Snowdon*, 2 W. Blk. 1224.

for the purpose of preparing it, and on the other hand a stipulation by him, when he quitted the farm, to allow the same privilege to the incoming tenant; and, therefore, that a notice to quit, given six months previous to Lady-day, although less than six months before Candlemas, was sufficient.(*g*)

Where the premises contained in the demise consisted of dwelling-houses, and other buildings, used for the purpose of carrying on a manufacture, a few acres of meadow, and pasture land, and bleaching-grounds, together with all water courses, &c. and the tenant held under a written agreement for a lease, to commence as to the meadow ground from the 25th of December then last, as to the pasture from the 25th of March then next, and as to the houses, mills, and all the rest of the premises, from the 1st of May, the rent payable on the day of Pentecost and Martinmas, the Court held, that the substantial time of entry was the 1st of May, inasmuch as the substantial subject of the demise was the house and buildings for the purpose of the manufacture, to which every thing else in the demise was merely auxiliary.(*h*)

Where a house and thirteen acres of land, were demised for eleven years, to hold the lands from the 2d of February, and the house and other premises from the first of May, at the yearly rent of 24*l.* payable at Michaelmas and Lady-day, the jury found the land to be the principal subject of the demise; and the plaintiff was nonsuited on account of the notice to quit not having been given six months previous to the 2d of February. The Court was afterwards

(*g*) *Doe*, d. *Strickland*, v. *Spence*, 6 East, 120.

(*h*) *Doe*, d. *Lord Bradford*, v. *Watkins*, 7 East, 551.

moved to set aside the nonsuit, on the ground that the house was the principal part of the demise; (being situated near a borough;) or, at all events, that the relative value and importance of the house and lands were so nearly balanced, it was immaterial to which the notice referred; but the Court refused the rule, saying, it was for the jury to decide which was the principal, and which the accessary part of the demise.(*i*)

Lastly, of the acts by which a regular notice to quit may be waived.

The acceptance of rent, accruing subsequently to the expiration of the notice, is the most usual means by which a waiver of it is produced; but the acceptance of such rent is not of itself a waiver of the notice, but matter of evidence only to be left to the jury, to determine with what views, and under what circumstances, the rent is paid and received.

If the money be taken *nomine pœnæ*, as a compensation for the trespass, or with an express declaration that the notice is not thereby intended to be waived, or if there be any fraud or contrivance on the part of the tenant in paying it, or if the payment be accompanied by other circumstances which may induce an opinion, that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance. The rent must be paid and received *as rent*, that is to say, it must be so paid and received, as to satisfy the jury of an intention to continue the tenancy, or the notice will remain in force. Thus, where the landlord brought an ejectment immediately upon the

(*i*) *Doe*, d. *Heapy*, v. *Howard*, 11 East, 498.

expiration of the notice, and after the appearance of the tenant in the action, received from him a quarter's rent, accruing subsequently to the day when the notice expired, but nevertheless continued his action, the Court were of opinion (upon a motion for a new trial, after a verdict for the defendant,) that from the continuance of the suit by the landlord, after the acceptance of the rent, a fair inference might be drawn, that he did not mean to waive his notice; and as that point had not been left for the consideration of the jury, (who had been directed at the trial to find for the defendant, upon the simple fact of the quarter's rent having been paid and received,) the motion for the new trial was granted.(*j*) So, also, where the rent was usually paid at a banker's, and the banker, in the common routine of business, received a quarter's rent from the tenant after the expiration of the notice, no waiver of the notice was thereby created.(*k*) But where the notice expired at Michaelmas, 1792, and the landlord accepted rent due at Lady-day, 1793, and did not bring his ejectment until after such acceptance, nor try the cause until 1795, the jury held that the notice was waived.(*l*)

The notice may also be waived by other acts of the landlord; but they are all open to explanation, and the particular act will, or will not, be a waiver of the notice, according to the circumstances which attend it. Thus, a second notice to quit, given after the expiration of the first notice, but also after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding his second notice, was holden to be no waiver of the

(*j*) *Doe*, d. *Cheny*, v. *Batten*, Cowp. 243.

(*k*) *Doe*, d. *Ash*, v. *Calvert*, 2 Campb. 387.

(*l*) *Goodright*, d. *Charter*, v. *Cordwent*, 6 T. R. 219.

notice originally given; because, it was impossible for the tenant to suppose, that the landlord meant to waive a notice upon the foundation of which he was proceeding to turn him out of his farm.(*m*) Where, also, after the expiration of a regular notice to quit, the landlord gave a second notice in these words:—"I do hereby desire you to quit the premises which you *now* hold of me, within fourteen days from this date, or I shall insist upon double value," it was ruled by Lord *Ellenborough*, C. J. at *Nisi Prius*, that the second notice could not be intended, or understood to be intended, as a waiver of the first, or even as an acknowledgment of a subsisting tenancy *at will* having for its object merely the recovery of double value; and the lessor of the plaintiff recovered upon a demise anterior to the expiration of the second notice.(*n*) So, also, where a notice was given "to quit the premises *which you hold under me*, your term therein having long since expired," the Court considered the paper as a mere demand of possession, and not as a recognition of a subsisting tenancy.(*o*)

But where the defendant was lessee by assignment of certain tithes, under an agreement, which only operated to create a tenancy from year to year, and the impropriator, in March, 1810, (some days after the assignment,) gave the original lessee a notice to quit at the Michaelmas following, and afterwards, in March, 1811, gave the assignee a notice to quit at the then next Michaelmas, the Court were clearly of opinion, that such second notice was a waiver as to the assignee of the former notice given to the original lessee. And, in answer to an argument in

(*m*) *Doe*, d. *Williams*, v. *Humphreys*, 2 East, 236.

(*n*) *Doe*, d. *Digby*, v. *Steel*, MS. and 3 Campb. 115.

(*o*) *Doe*, d. *Godsell*, v. *Inglis*, 3 Taunt. 54.

support of the efficacy of the first notice, that the original tenancy having expired at Michaelmas, 1810, could not be set up again by another notice to the defendant in 1811, inasmuch as the giving of a person notice to quit does not operate to create a tenancy in him, the Court observed, "It does not necessarily do so, but it is generally considered as an acknowledgment of a subsisting tenancy; and if the party obeys the notice, how can he be deemed a trespasser on account of a prior notice to another person? Nothing appears to shew, that the defendant had knowledge of any other notice to quit than the one which was served upon him;" and *Bayley*, J. added, "the second notice gives the defendant to understand, that if he quits at Michaelmas, 1811, he will not be deemed a trespasser.(*p*)

It may be collected from this case, that if a tenant, having underlet the premises, receive from his landlord a notice to quit, and the landlord afterwards give to the under-tenant a notice to quit, expiring at a subsequent period,(*q*) he is precluded from recovering in an ejectment against such under-tenant, upon a demise anterior to the time of the expiration of the notice so given by him to the under-tenant. And if, after the expiration of a regular notice, the landlord should give to the same tenant a second regular notice, in the usual form, to quit at the termination of the next, or any subsequent year of the tenancy, without referring therein to any claim for double value, and without having taken any steps, in the intermediate time, to enforce the first notice, it may be doubted, whether such second notice will not also amount to a waiver of the first.

(*p*) *Doe*, d. *Brierly*, v. *Palmer*, 16 East, 53.

(*q*) *Ante*, 122, 123.

In a case where a landlord, after the delivery of a notice to quit, promised the tenant that he should not be turned out until the place was sold, and after the sale of the premises, brought an ejectment upon a demise anterior to the time of the sale; it was contended that the permission to occupy was a waiver of the antecedent notice, so far as to prevent the tenant from being considered as a trespasser by relation back to the time when the notice expired, and that the demise ought to have been laid posterior to the day when the contract for the sale was made. But the Court held, that the permission amounted only to a declaration on the part of the landlord, that until the sale of the place, he would suspend the exercise of his right under the notice, and indulge the tenant by permitting him to remain on the premises; and that it was not intended to vacate the notice, or be destructive of any of the rights which the landlord had acquired under it.(*r*)[9]

The acceptance by the landlord of the double *value* of the premises, given by the stat. 4 Geo. II. c. 28. when the tenant wilfully holds over after the expiration of a written notice to quit, or the bringing of an action of debt for the same, will not be a waiver of the notice; for the double value is given as a penalty for the trespass, and not as a payment between landlord and tenant. But if, after the expiration of a notice to quit by the tenant, the landlord accept the double *rent* to which he is entitled by the stat. 11 Geo. II. c. 19., it seems that he cannot afterwards

(*r*) *Whiteaker*, d. *Boult*, v. *Symonds*, 10 East, 13.

[9] A notice to quit at the end of the year, is not waived by the landlord's permitting the tenant to remain in possession an entire year after the expiration of the notice. *Baggs* v. *Black*, 1 Binney, 333.

proceed upon the notice to quit; for this latter statute recognizes the party by the name of tenant, which the first statute does not, and gives a right of distress for the double rent, which is a remedy applicable only to the relation of landlord and tenant.(*s*)

In cases where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover it in an action for use and occupation, the notice will, of course, be waived :(*t*) but it seems that a pending action for such use and occupation will not be sufficient to invalidate the notice; for the landlord may only recover to the time of the expiration of the notice, although he claim rent to a later period.(*u*)

By the common law, if a landlord distrained after the expiration of a term, though for rent accruing during its continuance, he was held to have acknowledged a subsequent tenancy; because, by the common law, no distress could be made after the determination of a demise;(*v*) but since the statute 8 Ann. c. 14. s. 6. & 7. by which a landlord is allowed to distrain within six calendar months after the determination of a lease for life, for years, or at will, provided his own title, or interest, and the possession of the tenant, from whom such rent became due, be continuing, a distress for rent accruing at the time of the expiration of

(*s*) *Doe*, d. *Cheney*, v. *Batten*, Cowp. 245. *Timmins* v. *Rowlinson*, Burr. 1603. *Soulsby* v. *Neving*, 9 East, 310. *Ryal* v. *Rich*, 10 East, 48.

(*t*) *Zouch*, d. *Ward*, v. *Willingale*, 1 H. Blk. 311.

(*u*) *Per Buller*, J., *Birch* v. *Wright*, 1 T. R. 378. *et vide Roe*, d. *Crompton*, v. *Minshall*, S. N. P 650.

(*v*) *Pennant's* case, 3 Co. 64.

the notice to quit, if made within the six months, will be no waiver thereof.

Next, of the termination of a tenancy by the act of the tenant, which may happen in two several ways; first, by a notice to his landlord that he intends to quit the possession;(*w*) secondly, by the non-payment of rent, or non-performance of a covenant.(*x*)

As the relation of landlord and tenant is mutual, the principles which govern the first of these modes have been discussed, when treating of the notice to quit as given by the landlord; and it, therefore, now only remains to inquire into the regulations adopted by the courts in the two latter instances.

The right to give a notice to quit is given by the common law, and is necessarily incidental to a tenancy from year to year: the determination of a tenancy by the non-payment of rent, or the non-performance of a covenant, can only arise under an express agreement between the parties, and seldom occurs but where the tenant has a written lease for a determinate period.

It has already been observed,(*y*) that an actual entry upon the lands was formerly necessary before an ejectment could be maintained, and that the claimant's title must be of such a nature as to render his entry legal. When, there-

(*w*) Appendix, No. 4.

(*x*) As the non-payment of rent is, in fact, the non-performance of a covenant, this particular enumeration may perhaps be logically incorrect; but as the proceedings differ so materially in cases of non-payment of rent, and of non-performance of other covenants, it was thought most conducive to perspicuity, to name them separately.

(*y*) *Ante*, 10.

fore, a lease for years was granted to the tenant, and the right of possession thereby transferred to him, the landlord could not legally enter upon the land during the continuance of the term; and was, consequently, without remedy to recover back his possession whilst the term lasted, although the tenant should neglect to render his rent, or otherwise disregarded the conditions of his grant. When terms for years increased in length and value, this became a serious evil to landlords. The tenant might be so indigent as to render an action of covenant upon the original lease altogether useless, and the premises might be left without a sufficient distress to countervail an arrear of rent. As a means of obviating these difficulties, it became the practice for landlords to insert in their leases certain provisoes and conditions declaring the lease forfeited, if the rent remained unpaid for a certain time after it became due, or if any other particular covenant of the lease were broken by the lessee, and empowering the landlord in such cases to re-enter upon, and re-occupy his lands.

When provisoes of this nature were first introduced, the ancient practice prevailed, and of course actual entries were then made in these as in all other cases; and it seems also to have been necessary, for some years after the modern practice was invented, and the sealing of leases dispensed with, for landlords to make actual entries upon the lands, before they could take advantage by ejectment of the forfeiture of a lease. This useless form is now, indeed, abolished; but as the right to make the entry is still necessary, the provisoes are continued to the present day in their ancient terms.(z)

(z) *Little* v. *Heaton*, Salk. 258. S. Vent. 248. *Wither* v. *Gibson*, 3 Keb. C. Ld. Raym. 750. *Goodright*, d. 218. *Hare*, v. *Cator*, Doug. 477. *Anony.* 1

Having thus briefly shown the principles upon which these provisoes are founded, we shall now inquire, first as to the covenants deemed by our law to be valid; secondly, as to what will amount to the breach of any particular covenant, and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28. on a clause of re-entry for non-payment of rent; and, thirdly, as to the modes by which conditions may be dispensed with, or forfeitures waived.

The landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to the laws of the kingdom, nor to the principles of reason, or public policy; and it is by these general maxims we must be guided, when called upon to consider the validity of any particular covenant in a lease; for only one decided case upon the subject is to be found in our legal authorities.

The lease in that case was for twenty-one years, and the proviso, that the landlord should have the power to re-enter, if the tenant committed any act of bankruptcy whereon a commission should issue. This proviso was holden valid, upon the principle, that as it is reasonable for a landlord to restrain his tenant from assigning, so it is equally reasonable for him to guard against such an event as bankruptcy, for the consequences of bankruptcy would be an assignment; and that such a proviso is not contrary to any express law, nor against reason or puplic policy, for it is a proviso which cannot injure the creditors, who would not rely on the possession of the land by the occupier without a knowledge also of the interest he had therein; and to discover this they must look into the lease itself, where they would find the proviso, that the tenant's interest would be forfeited in

case of bankruptcy. *Buller*, J. in his judgment on the case, made a distinction between leases for short terms, and very long leases, with respect to provisoes of this nature; because, if they were to be inserted in very long leases, it would be tying up property for a considerable length of time, and be open to the objections of creating a perpetuity; but he afterwards adds, that the principal ground of his decision was, because it was a stipulation not against law, nor repugnant to any thing stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which it was competent for the lessor to make.(*a*)

Secondly, of what will amount to the breach of any particular covenant, and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28. on a clause of re-entry for non-payment of rent.

The power generally reserved in leases to landlords to re-enter upon the premises, in case the rent shall remain in arrear for a certain time after it is due, is the most common proviso upon which ejectments for forfeitures for breach of covenant are founded, and as several provisions are made, both by the common and statute law, for regulating ejectments brought upon such provisoes, a separate consideration of the mode of proceeding upon a clause of re-entry for rent in arrear, seems the most perspicuous method of treating the subject.

At the time when provisoes for re-entry were first introduced, it was unfortunately the practice to disfigure the principles of law by endless subtleties and distinctions;

(*a*) *Roe*, d. *Hunter*, v. *Galliers*, 2 T. R. 133.

and the preliminaries required by the common law, before a landlord can bring an ejectment upon a clause of re-entry for non-payment of rent, are so numerous, as to render it next to impossible for any, unversed in the practice of the courts, to take advantage of a proviso of this nature. First, a demand of the rent must be made, either in person, or by an agent properly authorised.(*b*) Secondly, the demand must be of the precise rent due; for if he demand a penny more, or less, it will be ill. Thirdly, it must be made *precisely upon the day* when the rent is due, and payable, by the lease, to save the forfeiture: as, where the proviso is, "that if the rent shall be behind and unpaid, by the space of thirty, or any other number of days after the day of payment, it shall be lawful for the lessor to re-enter," a demand must be made on the thirtieth, or other *last* day. Fourthly, it must be made a convenient time before sun-set. Fifthly, it must be made upon the land, and at the most notorious place of it. Therefore, if there be a dwelling-house upon the land, the demand must be at the front or fore door, though it is not necessary to enter the house, notwithstanding the door be open; but if the tenant meet the lessor either *on* or *off* the land, *at any time* of the last day of payment, and tender the rent, it is sufficient to save a forfeiture, for the law leans against forfeitures. Sixthly, unless a place is appointed where the rent is payable, in which case the demand must be made at such place. Seventhly, a demand of the rent must be made *in fact*, although there should be no person on the land ready to pay it.(*c*)

Nor are these the only vexatious difficulties to which a

(*b*) *Roe*, d. *Westt* v. *Davis*, 7 East, 363.

(*c*) 1 Saund. 287. (*n.* 16.)

landlord, by the common law, was subject. The courts, notwithstanding his compliance with all the required formalities, would set aside the forfeiture, upon the payment of the debt and costs, at any time before execution executed ;(*d*) and the tenant might at any time apply to a court of equity for relief.

Where the ejectment is brought upon a clause of re-entry, and *less than six months rent is due*, all these evils still exist; although, by the wise provisions of the legislature, the landlord is now relieved from the two latter inconveniences, in all cases were six months rent is in arrear; and is also exempted from an observance of the forms and niceties of the common law, if there be likewise no sufficient distress upon the premises.

By the 4th Geo. II. c. 28. s. 2. it is enacted, that, " in " all cases between landlord and tenant, as often as it shall " happen that one half year's rent shall be in arrear, and " the landlord or lessor, to whom the same is due, hath " right by law to re-enter for the non-payment thereof, " such landlord or lessor shall and may, without any for- " mal demand or re-entry, serve a declaration in ejectment " for the recovery of the demised premises; or in case the " same cannot be legally served, or no tenant be in actual " possession of the premises, may then affix the same upon " the door of any demised messuage ; or in case such eject- " ment shall not be for the recovery of any messuage, then " upon some notorious place of the lands, tenements, or " hereditaments, comprised in such declaration in eject- " ment, and such affixing shall be deemed legal service " thereof, which service or affixing such declaration in

(*d*) *Roe*, d. *West*, v. *Davies*, 7 East, 363, *and the cases there cited.*

" ejectment, shall stand in the place and stead of a demand " and re-entry; and in case of judgment against the casual " ejector, or nonsuit for not confessing lease, entry, and " ouster, it shall be made to appear to the court where " the said suit is depending, by affidavit, or be proved upon " the trial, in case the defendant appears, that half a year's " rent was due before the said declaration was served; " and that no sufficient distress was to be found on the de- " mised premises, countervailing the arrears then due, and " that the lessor or lessors in ejectment had power to re- " enter; that then, and in every such case, the lessor or " lessors in ejectment shall recover judgment and execu- " tion, in the same manner as if the rent in arrear had been " legally demanded, and a re-entry made; and in case the " lessee or lessees, his, her, or their assignee or assignees, " or other person or persons claiming or deriving under " the said leases, shall permit and suffer judgment to be " had and recovered on such ejectment, and execution to " be executed thereon, without paying the rent and arrears, " together with full costs, and without filing any bill or " bills for relief in equity, within six calendar months after " such execution executed; then such lessee, &c. and all " other persons claiming and deriving under the said lease, " shall be barred and foreclosed from all relief or remedy " in law or equity, other than by writ of error, for reversal " of such judgment, in case the same shall be erroneous, " and the said landlord or lessor shall from thenceforth " hold the said demised premises discharged from such " lease; and if on such ejectment, a verdict shall pass for " the defendant, or the plaintiff shall be nonsuited therein, " except for the defendant's not confessing, &c. then such " defendant shall have and recover, his, her, or their full " costs: provided always, that nothing herein contained " shall extend to bar the right of any mortgagee or mort-

" gagees of such lease, or any part thereof, who shall not " be in possession, so as such mortgagee or mortgagees " shall, within six calendar months after such judgment " obtained, and execution executed, pay all rent in arrear, " and all costs and damages sustained by such lessor, or " persons entitled to the remainder or reversion as afore- " said, and perform all the covenants and agreements, which " on the part and behalf of the first lessee or lessees ought " to be performed."

By section 3, " in case the said lessee or lessees, his, her, " or their assignee or assignees, or other person claiming " any right, title, or interest, in law or equity, of, in, or to " the said lease, shall, within the time aforesaid, file one " or more bill or bills, for relief in any court of equity, such " person or persons shall not have or continue any injunc- " tion, against the proceedings at law on such ejectment, " unless he, she, or they shall, within forty days next after " a full and perfect answer shall be filed by the lessor " or lessors of the plaintiff in such ejectment, bring into " Court, and lodge with the proper officer, such sum of " money, as the lessor or lessors of the plaintiff in the said " ejectment shall, in their answers, swear to be due and " in arrear, over and above all just allowances, and also " the costs taxed in the said suit, there to remain till the " hearing of the cause, or to be paid out to the lessor or " landlord on good security, subject to the decree of the " Court; and in case such bill or bills shall be filed within " the time aforesaid, and after execution is executed, the " lessor or lessors of the plaintiff shall be accountable only " for so much, and no more, as he, she, or they shall really " and *bona fide*, without fraud, deceit, or wilful neglect, " make of the demised premises from the time of their en- " tering into the actual possession thereof; and if what

" shall be so made by the lessor or lessors of the plaintiff, " happen to be less than the rent reserved on the said " lease, then the said lessee or lessees, his, her, or their " assignee or assignees, before he, she, or they shall be " restored to his, her, or their possession or possessions, " shall pay such lessor or lessors, or landlord or landlords, " what the money so by them made, fell short of the re- " served rent, for the time such lessor or lessors of the " plaintiff, landlord or landlords, held the said lands."

Section 4. " Provided, that if the tenant or tenants, his, " her, or their assignee or assignees, shall at any time be- " fore the trial in such ejectment, pay or tender to the " lessor or landlord, his executors or administrators, or his, " her, or their attorney in that cause, or pay into the court " where the same cause is depending, all the rent and ar- " rears, together with the costs, then all further proceed- " ings on the said ejectment shall cease and be discontinued; " and if such lessee, &c. or their executors, administrators, " or assigns, shall, upon such bill filed as aforesaid, be re- " lieved in equity, he, she, and they, shall have, hold, and " enjoy, the demised lands, according to the lease thereof " made, without any new lease to be thereof made to him, " her, or them."[1]

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[1] But where the proceeding is at common law, the claim of the plaintiff is *stricti juris*, and all the niceties required by the common law must be previously complied with to entitle the reversioner to re-enter. There must be a demand of the rent due on the last day, at such a convenient time before sunset, that the money may be numbered and received, and it is incumbent on the plaintiff to show during what part of the afternoon the demand was made. *Jackson* v. *Harrison*, 17 Johns. 66.

By a recent statute of New-York, landlords are enabled to regain the possession from refractory tenants, by a process far more summary than the remedy by ejectment. The statute passed 43d Session, (1820) chap. 194. page 176. will be found in Appendix, No. 49.

Some little perplexity attends the wording of these sections, which seem, upon the first reading, to extend only to cases of ejectment brought after half a year's rent due, where the landlord has a right to re-enter, and where no sufficient distress is to be found upon the premises; but the statute has been held to be more general in its operation, and its provisions (with the exception of the one, which dispenses with the formalities required by the common law upon a clause of re-entry for non-payment of rent) extend to all cases where there is six months rent in arrear, and a right of re-entry in the landlord.(*e*)

The legislature appear to have four different objects in view, in the enactments of this statute. First, to abolish the idle form of a demand of rent, where no sufficient distress can be found upon the premises to answer that demand; secondly, in cases of beneficial leases which may have been mortgaged, to protect the mortgagees against the fraud or negligence of their mortgagors. Thirdly, to render the possession of the landlord secure, after he has recovered the lands; and fourthly, to take from the Court the discretionary power they formerly exercised, of staying the proceedings, at any stage of them, upon payment of the rent in arrear, and costs. The first of these objects is effected by permitting the landlord to bring his ejectment without previously demanding the rent: the second, by permitting a mortgagee not in possession to recover back the premises at any time within six months after execution executed, by paying all the rent in arrear, damages and costs of the lessor, and performing all the covenants of the lease:(*f*) the third, by limiting the time for the lessee

(*e*) *Roe*, d. *West*, v. *Davis*, 7 East, 363.

(*f*) It is difficult to discover from the report of the case of *Doe*, d. *Whit-*

or his assigns, to make an application to a court of equity for relief, to six calendar months after execution executed: and the fourth, by limiting the application of the lessee to stay proceedings, upon payment of the rent in arrear and costs, to the time anterior to the trial, and making it compulsory upon the Court to grant the application when properly made.(*g*)

As this statute dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises, as well as six months rent in arrear, it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed upon a clause of re-entry for non-payment of rent, if a sufficient distress can be found.(*h*) But an insertion in the proviso of the lease that the right of re-entry shall accrue *upon the rent being lawfully demanded*, will not render a demand necessary if there be no sufficient distress, for it is only stating in express words, that which is in substance contained from the principles of the common law in every proviso of this nature.(*i*)

field, v. *Roe*, 3 Taunt. 402, what was the true point submitted to the judgment of the court. It is quite clear it is not the one stated in the margin, *viz.* "that the *mortgagee* of a lease has the *same* title to relief against an ejectment for non-payment of rent, and upon the same terms, as the *lessee* against whom the recovery is had," because by the provisions of this statute, a lessee can only have relief against an ejectment for a forfeiture, upon paying the arrears of rent and costs of suit into court *before trial*, whereas a mortgagee may obtain relief upon paying the arrears, costs, and damages, at any time *within six months after execution executed.*

(*g*) *Roe*, d. *West*, v. *Davis*, 7 East, 363.

(*h*) *Doe*, d. *Forster*, v. *Wandlass*, 7 T. R. 117. Vide *Smith* v. *Spooner*, 3 Taunt. 246—252.

(*i*) *Doe*, d. *Schofield*, v. *Alexander*, 2. M. & S. 525. Lord *Ellenborough*, C. J. differed from the other judges in this case, he being of opinion, that when the words "*being lawfully demanded*" were inserted in a proviso for re-entry, they were to be considered as a stipulation between the parties that the rent should be, in fact, demanded (though not with the strictness of the common law) before ejectment brought.

It has been observed, that the provisions of this statute (with the exception of the one relating to the demand of rent) extend to all cases where there is six months rent unpaid, and the landlord has a right to re-enter. This point has only been decided upon that part of the fourth section which directs all proceedings to be staid upon payment of the rent in arrear and costs before trial; but the principle of the decision seems to apply to all the other provisions of the statute as well as to the one then immediately before the Court.—It was objected in that case that *the statute* only applied to cases of ejectment brought after half a year's rent due, where no sufficient distress was to be found upon the premises; but Lord *Ellenborough*, C. J., says, "*the statute* is more general in its operation; for though the fourth clause has the word *such*, (such ejectment,) yet the second clause, to which it refers, is in the disjunctive; stating first, that in *all* cases between landlord and tenant, when half a year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he may bring ejectment, &c., *or* in case the same cannot be legally served, &c. *or* in case such ejectment shall not be for the recovery of any messuage, &c. and in case of judgment against the casual ejector, or nonsuit, for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the declaration served, and that no sufficient distress was to be found on the premises, and that the lessor had power to re-enter; *then, and in every such case*, the lessor in ejectment shall recover judgment and execution."(*k*)

By the words of the fourth section the lessee is to pay the

(*k*) *Roe*, d. *West*, v. *Davis*, 7 East, 363.

arrears of rent, &c. into court *before the trial;* and no provision is expressly made for his relief in case he should suffer judgment to go by default against the casual ejector. If, however, the point should arise, it is probable that the Court would not consider a judgment so obtained as equivalent to a trial, but would grant relief to the lessee at any time before execution executed. In the case of *Goodtitle* v. *Holdfast*,(*l*) which was decided about the time when the statute was enacted, relief was given under such circumstances; but as there is no allusion to the statute in the report of the case, it is probable that the decision took place before it passed into a law.

The provision of this fourth section seems also to extend only to cases where the rent and costs are tendered to the lessor, or paid into court, after action brought; yet where the tenant tendered the rent in arrear after the lessor had given instructions to his attorney to commence an action, but before the declaration had been delivered, the court set aside the proceedings with costs, although it was urged by the lessor that such tender was merely matter of defence at the trial.(*m*)

Where the ejectment was brought on a clause of re-entry in the lease for not repairing, as well as for rent in arrear under the statute, it was argued, on a motion to stay proceedings upon payment of the rent, that the case was not within the act, because it was not an ejectment founded singly on the non-payment of rent; but the court, notwithstanding, made the rule absolute, with liberty for the lessor to proceed on any other title.(*n*) But where the lessor has

(*l*) *Easter Term*, 4 Geo. II. Stran. 900.
(*m*) *Goodright*, d. *Stephenson*, v. *Noright*, W. Black. 746.
(*n*) *Pure*, d. *Withers*, v. *Sturdy*, B. N. P. 97.

recovered possession of the premises, a court of equity will not grant relief under the second section, if such recovery was by reason of the breach of other covenants or conditions, as well as by the non-payment of rent. And where the tenant applied to the Court of Chancery to relieve against a recovery upon judgment by default against the casual ejector, alleging that the ejectment was brought for a forfeiture incurred by non-payment of rent, which allegation was contradicted by the landlord, who stated in his answer, that the tenant had also broken many of the covenants of the lease, for which the landlord had a right to re-enter; the court directed an issue to try, whether the landlord knew of any of the breaches of covenant, at the time of bringing the ejectment.(*o*)

Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them, the defendant moved to stay proceedings on payment of the rent due to the lessors of the plaintiff as devisees, they not being entitled to bring ejectment as executors; there appeared to be a mutual debt to the defendant by simple contract, and the defendant offered to go into the whole account, taking in both demands, as devisees and executors, having just allowances, which the lessors of the plaintiff refused: the rule was made absolute to stay proceedings on payment of the rent due to the lessors as devisees, and costs.(*p*)

The proceedings may be staid, either by moving the court, or in vacation time by summons.(*q*)

(*o*) *Wadman* v. *Calcraft*, 10 Vez. 67.

(*p*) *Duckworth*, d. *Tubley*, v. *Tunstall*, Barn. 184.

(*q*) 2 Sell. Prac. 127.

In moving for judgment against the casual ejector, in an ejectment brought under the provisions of this statute, the Court will not grant a rule for judgment without an affidavit,(r) pursuant to the statute, that half a year's rent was in arrear before declaration served, that the lessor of the plaintiff had a right to re-enter, and that no sufficient distress was to be found upon the premises countervailing the arrears of rent then due: and, if the case require it, the affidavit must also go on to state, that the premises were untenanted, or that the tenant could not be legally served

(r) In the case of *Doe*, d. *Hitchings*, v. *Lewis*, (Burr. 614.) it appeared, that the lessor of the plaintiff had once been tenant to the defendant, under a lease for a term of years, of which some were yet to come; and had been ejected by him nearly twenty years before, by a judgment in ejectment against the casual ejector, pursuant to the statute of 4 Geo. II. c. 28. for non-payment of rent. The title set up by the lessor in this last action was the irregularity of the proceedings in the first ejectment, from the want of a proper affidavit whereon to ground the judgment; and the question for the Court to decide was, whether it was necessary for the defendant (the original landlord) to give evidence of this affidavit. The court were unanimously of opinion, that from the lapse of years no such evidence was necessary;[2] but it seems to have been Lord *Mansfield's* opinion, that if the lessor of the plaintiff in the second action had proved, that in point of fact no affidavit had been made, he would have been entitled to recover. But *quære*, if the proper method in such case, if the judgment be recent, is not to move the court, upon affidavit of facts, to set aside the judgment for irregularity?

[2] The same point was ruled by the Supreme Court of New-York, in *Jackson* v. *Wilson*, (3 Johns. Cas. 296.) where they say, "if the proceeding was under the statute, we must consider the regular affidavit as having been filed; or, if otherwise, that all the requisites attending an actual entry at common law had been complied with."

Where lessee, under a perpetual lease, abandoned the premises, and persons claiming under lessor had been in possession for fourteen years since lessee's departure, a re-entry by the lessor was presumed. *Jackson* v. *Demarest*, 2 Caines' Rep. 383. and *Kent*, J cites a case where an affidavit of arrears had been presumed. Also *vide Jackson* v. *Stewart*, 6 Johns. 34.

An ejectment does not lie against an absconding tenant. *Jackson* v. *Hakes*, 2 Caines' Rep. 335.

with the declaration, or as the facts may be, and that a copy of the declaration was affixed on the most notorious (stating what) part of the premises.(*s*)

This affidavit is of course only necessary upon moving for judgment against the casual ejector, or after a nonsuit at the trial for the tenant's not confessing lease, entry, and ouster; but if the tenant appear, and the ejectment come to trial, the matters contained in the above affidavit must be proved.(*t*)

When a forfeiture has accrued upon a clause of re-entry for rent in arrear, such forfeiture will be waived, if the landlord do any act after the forfeiture which amounts to an acknowledgment of a subsisting tenancy; as if he receives rent due at a subsequent quarter, or distrain for that in respect of which the forfeiture accrued, or receive the same and give a receipt for it as for so much rent, or in which he calls the party his tenant. It seems, however, according to the old authorities, that in the case of a lease for years, the bare acceptance by the lessor at a subsequent day, of the rent, in respect of which the forfeiture accrued, although before ejectment brought, will not of itself, unless accompanied with circumstances which show an intention to continue the tenancy, bar him of his right to re-enter, because the rent is a duty due to him, and as well before as after re-entry, he may have an action of debt for the same on the contract between the lessor and lessee; but that in the case of a lease for life, the mere acceptance of such rent will be sufficient to affirm the lease, as the lessor could not receive it as due upon any contract,

(*s*) Appendix, No. 19.

(*t*) *Doe*, d. *Hitchings*, v. *Lewis*, Burr. 614. 20.

but must receive it as his rent; for when he accepted the rent he could not have an action of debt for it, but his remedy was by assize, if he had seisin, or distress.(*u*)

Where an ejectment was brought upon a proviso of re-entry for non-payment of rent, and the lessor also commenced an action of covenant for rent, accruing subsequently to the day of the demise in the ejectment, and the tenant paid into court the rent demanded in the action of covenant, the forfeiture was holden to be waived; but it seems doubtful, whether the commencement of the action of covenant was *of itself* sufficient to waive the forfeiture.(*v*)

It seems that a landlord will not waive his right of re-entry for a forfeiture, incurred by non-payment of rent, by taking an insufficient distress for that rent.(*w*)

(*u*) *Green's* case, Cro. Eliz. 3. S. C. 1 Leon. 262. *Pennant's* case, 3 Co. 64. *et vide Doe*, d. *Cheney*, v. *Batten*, Cowp. 243.

(*v*) *Doe*, d. *Crompton*, v. *Minshul*, B. N. P. 96. S. N. P. 650.

(*w*) *Brewer*, d. *Lord Onslow*, v. *Eaton*, cited in *Goodright*, d. *Charter*, v. *Cordwent*, 6 T. R. 220. It may be useful to notice in this place a provision of the legislature in one particular case of rent in arrear, although it does not strictly belong to a treatise on ejectment. By the statute 11 Geo. II. c. 19. s. 16. after reciting, that landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to be uncultivated without any distress thereon, whereby the landlords or lessors might be satisfied for the rent in arrear; but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering them in ejectment, it is enacted, "That if any tenant "holding any lands, tenements, or "hereditaments, at a rack rent, or "where the rent reserved shall be full "three-fourths of the yearly value of "the demised premises, who shall be in "arrear for one years' rent, shall de-"sert the demised premises, and leave "the same uncultivated or unoccupi-"ed, so as no sufficient distress can "be had to countervail the arrears of "rent; it shall and may be lawful, to "and for two or more justices of the "peace of the county, riding, division, "or place, (having no interest in the "demised premises,) at the request of "the lessor or landlord, lessors or "landlords, or his, her, or their bailiff "or receiver, to go upon and view "the same, and to affix, or cause to

With respect to provisoes for re-entry upon the breach of other conditions, no general principle can be laid down, excepting that which arises out of the maxim of our law that every doubtful grant shall be construed in favour of the grantee; namely, that the breach complained of must come within the very letter of the covenant, or the lease will not be forfeited; and the clearest method of showing the application of this principle will be by giving a short digest of the cases upon the subject.

Where the lessee covenanted with the lessor not to *assign* his term without the lessor's consent, and afterwards *devised* his term without such consent, it was holden not to amount to a forfeiture, for a *devise* is not a *lease*.(*x*)[3]

"be affixed, on the most notorious part "of the premises, notice in writing, "what day (at the distance of four- "teen days at least) they will return "to take a second view thereof; and "if upon such second view the tenant, "or some person on his or her behalf, "shall not appear, and pay the rent "in arrear, or there shall not be suf- "ficient distress upon the premises; "then the said justices may put the "landlord or landlords, lessor or les- "sors, into the possession of the said "demised premises; and the lease "thereof to such tenant, as to any de- "mise therein contained only, shall "from thenceforth become void."

Sect. 17. "Provided always, that "such proceedings of the said justices "shall be examinable in a summary "way, by the next justice or justices "of assize, of the respective counties "in which such lands or premises lie; "and if they lie in the city of London, "or county of Middlesex, by the "judges of the courts of King's Bench, "or Common Pleas; and if in the "counties palatine of Chester, Lan- "caster, or Durham, then before the "judges thereof; and if in Wales, "then before the courts of grand-ses- "sions respectively; who are hereby "respectively empowered to order re- "stitution to be made to such tenant, "together with his, or her expences "and costs, to be paid by the lessor "or landlord, lessors or landlords, if "they shall see cause for the same; "and in case they shall affirm the act "of the said justices, to award costs, "not exceeding five pounds, for the "frivolous appeal." The provisions of this statute, however, like those of 4 Geo. II. c. 28. are holden to extend only to cases where the landlord has a right of re-entry reserved to him by the demise. Wood, L. & T. 523.

(*x*) *Fox* v. *Swan*, Sty. 482.

[3] If there is a covenant in a lease, that lessee should permit *no more than*

Where the lessee covenanted not to demise, assign, transfer, or set over, or *otherwise do or put away* the indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whatsoever, and afterwards made an *under-lease* of the premises, it was held not to be a breach of the covenant, or a forfeiture of term, for an *under-lease* is not an *assignment*. And it was said by the Court, in answer to an argument, that although an *under-lease* did not amount to an *assignment*, yet that it was a *transferring*, *setting over*, *doing*, *or putting away*, *with the premises;* that the Courts have always looked nearly into these conditions, covenants, and provisoes; that the devising a term *was a doing or a putting it away;* so being in debt by confessing a judgment, and having the term taken in execution was the like; but that none of these amounted to an *assignment*, or to a breach of the covenant, or condition.(*y*)

It seems to have been once holden, that if a lessee for years grant the lands to another for the whole term he has therein, but reserve the rent payable to himself, and not to the original lessor, it will be a lease, and not an as-

(*y*) *Crusoe*, d. *Blencowe*, v. *Bugby*, 3 Wils. 234.

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one person to every hundred acres of land to reside on, use, or occupy the premises, and the lessee lets part of the premises to persons for a year to cultivate on shares, it is a breach of the condition. *Jackson* v. *Brownell*, 1 Johns. 267. *Jackson* v. *Rich*, 7 Johns. 194.

For the object of the provision, doubtless, was to guard against having too great a proportion of the land ploughed the same season, and is for the benefit of husbandry, and the underletting is, in that point of view, clearly against the intention of the parties. *Ibid.* But where the quantity of land demised was 135 acres, it is not a breach for the lessee to permit another person besides himself to occupy the premises, for otherwise the covenant is in a great degree senseless. *Jackson* v. *Agan*, 1 Johns. 278.

signment, notwithstanding the want of a reversion in the party so granting; but this doctrine, if the decision were as reported, has since been overruled.(*z*)

Where the lease contained a proviso, that the lessee should not set, *let*, or assign *over*, the whole, or any part, of the premises, without leave in writing, on pain of forfeiting the lease, it was held that the lessee could not *underlet* without incurring a forfeiture; because, the word *over* was annexed only to the word *assign*; and, therefore, the condition was broken, if the lessee *let* the premises, or any part of them, for any part of the time.(*a*) And where the proviso was not to assign, or *otherwise part with the premises*, for the whole, or any part, of the term, the proviso was held to be broken by an under-lease, as well as by an assignment.(*b*)[4]

(*z*) *Poultney* v. *Holmes*, Stran. 405. *Palmer* v. *Edwards*, Doug. 187, *in notis*. It seems, from these cases, that a parol assignment of the whole term, which is void by the statute of frauds, will be good as an under-lease; but *quære* if the tenancy thereby created does not enure as a tenancy from year to year, and not as a tenancy for the residue of the term. *Vide Doe*, d. *Rigge*, v. *Bell*, 5 T. R. 471. *Clayton* v. *Blakey*, 8 T. R. 3.

(*a*) *Roe*, d. *Gregson*, v. *Harrison*, 2 T. R. 425.

(*b*) *Doe*, d. *Holland*, v. *Worseley*, 1 Campb. 20.

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[4] Where lessee for lives, covenanted *not to sell, dispose of, or assign, his estate in the demised premises*, he was held not to have violated the covenant by underleasing the premises for twenty years, and that nothing short of an assignment of his whole estate in the land could work a forfeiture. The lessee conveyed only a lesser estate for years, out of his larger estate for life, which was plainly a mere *sub-letting*, and not a *selling and disposing of, nor an assigning of his estate* in the premises. *Jackson* v. *Silvernail*, 15 Johns. 278.

Nor would a sale under an execution against the lessee work a forfeiture. *Ibid.*

Where a lease for seven years contains a condition, that the lessee *shall not assign the premises, or any part thereof*, the assignment of two years of the term was held not to be a forfeiture, and the words of the lease held to

Where a lease contained a proviso for re-entry, in case the tenant should demise, or let the demised premises, or any part thereof, for all or any part of the term without license, and the tenant without license agreed with a person to enter into partnership with him, and that he should have the use of certain parts of the premises *exclusively*, and of the rest jointly with him the tenant, and accordingly let him into possession; it was held that the lease was forfeited thereby; for that it was a parting with the exclusive possession of some part of the demised premises, and whether it were gratuitously, or for rent reserved, was immaterial.(*c*)

A covenant not to underlet any part of the premises without license, is not broken by taking in lodgers; for, *per* Lord *Ellenborough*, C. J. "The covenant can only extend to such underletting as a license might be expected to be applied for, and whoever heard of a license from a landlord to take in a lodger?"(*d*)

Where the lessee enters into covenants not to assign, &c. the courts will distinguish between those acts which are done by him voluntarily, and those which pass *in*

(*c*) *Roe*, d. *Dingley*, v. *Sales*, 1 M. & S. 297.

(*d*) *Doe*, d. *Pitt*, v. *Laming*, 4 Campb. 77.

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mean an assignment of the premises, or a part thereof, for the whole term. *Jackson* v. *Harrison*, 17 Johns. 66.

Where, in a lease in fee to a man, *and his heirs and assigns for ever*, yielding a certain yearly rent, there was inserted a covenant that lessee should not alien without lessor's consent, and on every such alienation should pay lessor one tenth of the purchase money received on said alienation, and in the lease was a clause of re-entry for breach of condition, the Court held the condition valid, and not repugnant to the grant, and that ejectment would lie for a breach. *Jackson* v. *Schulz*, 18 Johns. 174.

invitum, and will not hold the latter to be a breach of the covenant. Thus, if the lessee become bankrupt, and the term be assigned under the commission, no forfeiture will be incurred;(*e*) unless, indeed, there be an express stipulation in the proviso that it shall extend to the bankruptcy of the lessee.(*f*) And where a lessee, who had covenanted not to "let, set, assign, transfer, make over, barter, exchange, or otherwise part with, the indenture," with a proviso, that in such case the landlord might re-enter, afterwards gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; it was held to be no forfeiture of the lease, unless the warrant of attorney were given expressly for the purpose of having the lease taken; for judgments, in contemplation of law, always pass *in invitum*. And Lord *Kenyon*, C. J. said, "there was no difference between a judgment obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney; since the latter is merely to shorten the process, and lessen the expence of the proceedings:" but if the warrant of attorney be expressly given for the purpose of having the lease taken in execution, it will be held to be in fraud of the covenant, and a forfeiture of the lease.(*g*)[5]

This protection extends also to the party, to whom the

(*e*) *Doe*, d. *Goodbehere*, v. *Bevan*, 3 M. & S. 353.

(*f*) *Roe*, d. *Hunter*, v. *Galliers*, 2 T. R. 133.

(*g*) *Doe*, d. *Mitchinson*, v. *Carter*, 8 T. R. 57. 300.

[5] The same point has been decided by the Supreme Court of New-York, in *Jackson* v. *Corlies*, (7 Johns. 531, 534.) who say, that it is the province of the jury to decide, whether the judgment confessed by the lessee was fraudulent or not. Also *vide Jackson* v. *Silvernail*, 15 Johns. 278, 280.

term is by law assigned. The reason of this is, that such assignee cannot be encumbered with the engagement belonging to the property which he takes, but must be allowed to divest himself of it, and convert it into a fund for the benefit of the creditors; and, therefore, a forfeiture is not incurred, if the assignees sell the term.(*h*)

But where one leased for twenty-one years, "if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm-house, and *actually occupy* the lands, &c. and not let, set, assign over, or otherwise depart with the lease," the tenant having become bankrupt, and his assignees having possessed themselves of the premises, and sold the lease, and the bankrupt being out of the possession and occupation of the farm, it was held, that the lessor might maintain ejectment. And this case was distinguished from the one just mentioned, as not being a case of forfeiture; but one in which the term itself was made to continue and depend upon the personal occupation of the lessee, and that therefore the term itself ceased, when the lessee had no longer the occupation of the farm.(*i*)

Where a lease contained an exception out of the demise of all trees then growing, or thereafter to grow upon the demised premises, and also a proviso, that if the defendant should commit any *waste in or upon the said demised premises*, it should be lawful for the lessor to re-enter; it was held to be no forfeiture of the lease, to cut down the trees excepted; for that waste could only be committed of the thing demised, and those trees being excepted out of the demise,

(*h*) *Doe*, d. *Goodbehere*, v. *Bevan*, 3 M. & S. 353.

(*i*) *Doe*, d. *Lockwood*, v. *Clarke*, 8 East, 185.

no waste could be committed of them, and consequently no forfeiture, within the provision of the lease, could be incurred by cutting them down.(*j*)

A covenant, "not to use or exercise, or permit, or suffer, to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever," is broken by an assignment to a schoolmaster, who kept his school upon the premises.(*k*)

Where a lease contained a covenant "to insure and keep insured a given sum of money upon the premises during the term, in some sufficient insurance office," the covenant was interpreted, by reasonable intendment, to mean insurance against fire; and the lessee, having insured the proper sum, but omitted to pay the annual premium within the time allowed by the office for payment, was held to have forfeited his lease upon a clause of re-entry, although he paid the premium within fourteen days after such time, and no action had been commenced, and no accident had happened by fire to the premises, in the mean time.(*l*) But where, in pursuance of a similar covenant, the lessee effected an insurance (the policy containing a memorandum, that in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death,) and died, and the representative, after the three months had expired, but before ejectment brought, obtained the proper indorsement, Lord *Ellenborough*, C. J. was of opinion that the policy did not become void for

(*j*) *Goodright*, d. *Peters*, v. *Vivian*, 8 East, 190.

(*k*) *Doe*, d. *Bish*, v. *Keeling*, M. & S. 95.

(*l*) *Doe*, d. *Pitt*, v. *Sherwin*, 8 Cambp. 134.

want of the indorsement within the three months, but at most was only voidable by the company, and ruled, that no forfeiture was incurred.(*m*)

A covenant in a lease to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "*reasonable use and wear only excepted*," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded.(*n*)

A lease with a clause of re-entry, for non-performance of covenants contained a general covenant on the part of the lessee, to keep the premises in repair; and it was further stipulated by another independent covenant, that the lessee, within three months, from the time of a notice to repair being served upon him by the landlord, should repair all the defects specified in the notice; the landlord, after serving him with a notice to repair, was allowed to bring an ejectment against him within the three months, for a breach of the general covenant to repair.(*o*)[6]

Where a lease, rendering rent, contained a covenant that the lessee should not assign without leave of the lessor, after which covenant was a proviso, that if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee, should be broken, it should be lawful for the lessor to re-enter, and there were

(*m*) *Doe*, d. *Pitt*, v. *Laming*, 4 Campb. 76.

(*n*) *Doe*, d. *Jones*, v. *Crouch*, 2 Campb. 449.

(*o*) *Roe*, d. *Goatley*, v. *Paine*, 2 Campb. 520.

[6] Where lessee covenants to pay all taxes, plaintiff must show a demand of the tax. *Jackson* v. *Harrison*, 17 Johns. 66.

no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, should quietly enjoy; it was held that the lessor could not re-enter for breach of the covenant not to assign, the proviso being restrained by the word "*hereinafter*" to subsequent covenants; and although there were none such, yet the court could not reject the word.(*p*)[7]

Where a beneficial long lease reserved to the lessee the liberty to cut down and dispose of all timber, &c. then growing, or thereafter to grow during the term, subject to the following proviso, that *when and so often as* the lessee should intend, during the term, to fell timber, &c. he should immediately give notice in writing to the lessor of such intention, who should thereupon have the option of purchasing it, with a power of re-entry, in case of a breach of this proviso, and the lessee, soon after the execution of the lease, (at that time intending *bona fide* to cut down the whole of the then growing timber,) gave the proper notice in writing to the lessor, who did not accept the purchase, but disclaimed it; the lease was not forfeited, although the lessee did not forthwith fell all the timber, &c. but proceeded to cut down the same in different seasons, at his own convenience, without giving any fresh notices to the lessee,

(*p*) *Doe* d. *Spencer*, v. *Godwin*, 4 M. & S. 265.

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[7] Where, *at the bottom* of a lease containing a clause of re-entry, lessee agreed not to make any alterations in the buildings, it was held to be a mere covenant, and not a condition for a breach of which the lease was to be forfeited. *Jackson* v. *Harrison*, 17 Johns. 66.

or his assignee, to whom he had, previously to the last cuttings, conveyed his interest.(*q*)

In all these cases, the tenancy was created by deed: but the principle is the same if the tenant holds under an agreement for a lease, which specifies the covenants to be inserted in the lease, and that there shall be a power of reentry for a breach of them.(*r*)

Next of the means by which a covenant may be dispensed with.[8]

To enable a reversioner(*s*) to take advantage of a forfeiture, it is necessary that he should have the same estate in the lands at the time of the breach, as he had when the condition was created; an extinguishment of the estate in reversion, in respect of which the condition was made, extinguishing the condition also.(*t*) Thus, where a lease was made for a hundred years, and the lessee made an underlease for twenty years, rendering rent, with a clause of reentry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the

(*q*) *Goodtitle*, d. *Luxmore* v. *Saville*, 16 East, 87. Lord Ellenborough, C. J., and Le Blanc, J., intimated an opinion, that a Court of equity would probably, under the circumstances, give the lessor or his assignee a new option to purchase.

(*r*) *Doe*, d. *Oldershaw* v. *Breach*, 6 Esp. 106.

(*s*) For covenants upon which the assignee of reversion may sue. Vide ante, 74.

(*t*) *Dumpor's* case, 4 Co. 120(*b*).

[8] Where a lessee disclaims all holding under the lessor, it will work a forfeiture of the lease; but where a plaintiff in replevin denies in his plea, that the place in which the distress was taken was within the demised premises, such denial does not amount to such a disclaimer as to work a forfeiture. *Jackson* v. *Rogers*, 11 Johns. 33, 35.

term, it was holden, that the grantee should not have, either the rent, or the power of re-entry; for the reversion of the term to which they were incident was extinguished in the reversion in fee.(*u*)

The reversioner must also be entitled to the reversion, at the time the forfeiture is committed, or he cannot take advantage of it.(*v*)

When the condition is, that the lessee will not do any particular act without leave from his lessor, if leave be once granted, the condition is gone for ever; for the condition is to be taken strictly, and by the license it is satisfied.(*w*) And, in like manner, when a condition is entire, a license to dispense with a part of the condition is a dispensation of the whole. As where the lease contains a clause, that the lessee shall not assign without leave from his lessor, the lessee, under a license to assign part of the premises, may assign the whole without incurring a forfeiture.(*x*) But the license must be such as is required by the lease; and, therefore, where the lease required the licence to be in writing, a parol licence was held to be insufficient.(*x*)

Provisoes for re-entry are also construed strictly with respect to the parties who may take advantage of them, and only include the persons who are expressly named. Thus, a power for *C.* to enter will not extend to his execu-

(*u*) *Thre'r* v. *Barton*, Moore, 94. *Webb* v. *Russell*, 3 T. R. 393. 402.

(*v*) *Fenn*, d. *Matthews*, v. *Smart*, 12 East, 444.

(*w*) *Dumper* v. *Syms*, Cro. Eliz. 815. S. C. 4 Co. 119.(*b*)

(*x*) *Roe*, d. *Gregson* v. *Harrison*, 2 T. R. 425. *Seers* v. *Hind*, 1 Vez. jun. 294.

tor.(*x*) And it seems, also, that if a lessee covenant with his lessor, that *he* will not assign, &c. a covenant so framed will not extend to his executors or administrators, although, if the executors or administrators be mentioned in the clause, they will be bound by it.(*y*)

A power of re-entry cannot be reserved to a stranger;(*z*) and where, in a building lease, a trustee and his *cestui que trust* were both demising parties, and the power of re-entry was reserved to both, and the state of the title appeared in the recitals in the lease, the court, without argument, held the proviso to be void.(*a*)

A forfeiture of a lease for a breach of covenant may be waived, as well as a forfeiture for non-payment of rent, or a notice to quit; that is to say, if the landlord do any act, with knowledge of the covenant being broken, which can be considered as an acknowledgment of a tenancy still subsisting; as, for example, if he receive rent accruing subsequently to the forfeiture,(*b*) unaccompanied by circumstances which show a contrary intention.(*c*) But where a right of entry was given in three months after notice of the premises being out of repair, and the landlord gave notice, and after the three months had expired, accepted rent accruing after such expiration, and then brought an ejectment, the premises being still out of repair, Lord *Kenyon*, C. J. was of opinion, that the right of re-entry was only waived up to the period for which the rent was received,

(*x*) *Hassel* d. *Hodson* v. *Gowthwaite*, Willes, 500.

(*y*) *Roe*, d. *Gregson*, v. *Harrison*, 2 T. R. 425. *Seers* v. *Hinde*, 1 Vez. jun. 294.

(*z*) *Co. Litt.* 214.

(*a*) *Doe*, d. *Barber* v. *Lawrence*, 4 Taunt. 23.

(*b*) *Fox*, v. *Swann*, Styles, 482. *Goodright*, d. *Walter*, v. *Davids*, Cowp. 803.

(*c*) *Ante*, 139.

and that the lessor was entitled to recover, upon a demise laid subsequently to that time. The jury, however, found a verdict for the defendant, and the court afterwards discharged a rule, which the lessor of the plaintiff obtained in the next term, for a new trial.(*d*)

But a waiver of one forfeiture incurred by breach of covenant, will not be a waiver of a second forfeiture incurred by another breach of the same covenant. And, therefore, where a right of re-entry was reserved on a breach of covenant not to under-let, it was held, that the lessor was entitled to re-enter upon a second under-letting, although he had waived his right so to do upon the first.(*e*) It is also necessary that some positive act of waiver should take place. The landlord will not lose his right to re-enter, by merely lying by, (however long the period,) and witnessing the act of forfeiture; but it seems, that if, with full knowledge thereof, he permits the tenant to expend money in improvements, it is a circumstance from which the jury may presume a waiver, as well as ground for application to a court of equity for relief.(*f*)

It seems scarcely necessary to observe, that no act of the landlord will operate as a confirmation of a lease, rendered voidable by a breach of covenant, unless he had full notice at the time of such act, that the forfeiture had been committed.(*g*)

Before quitting this branch of our subject, it is necessary to notice a material distinction which prevails between

(*d*) *Fryett*, d. *Harris*, v. *Jeffreys*, 1 Esp. 393.

(*e*) *Doe*, d. *Boscawen*, v. *Bliss*, 4 Taunt. 735.

(*f*) *Doe*, d. *Sheppard*, v. *Allen*, 3 Taunt. 78.

(*g*) *Roe*, d. *Gregson*, v. *Harrison*, 2 T. R. 425.

leases for *lives*, and leases for *years*, as to the consequences of a forfeiture, when the proviso, upon which the forfeiture occurs, declares the lease "*to be null and void*," or, "*to cease and determine*," &c. upon the breach of the condition, instead of being expressed in the common form, "*that it shall and may be lawful for the lessor, in such case, to re-enter.*" In leases for lives, whatever may be the words of the condition, it is in all cases held, that if the tenant be guilty of any breach of the condition of re-entry, the lease is voidable only, and not void; and, therefore, not determined until the lessor re-enters, that is, brings an ejectment for the forfeiture. Because, when an estate commences *by livery*, it cannot be determined before *entry*; and, consequently, if the lessor do any act which amounts to a dispensation of the forfeiture, the lease, which before was voidable only, is thereby affirmed, and the forfeiture waived. But when clauses of the same import, as those first above mentioned, are inserted in leases for years, if the lessee be guilty of any breach of the condition of re-entry, the lease becomes absolutely void, and determined thereby; and cannot be again set up by any subsequent act of the lessor. When, however, a lease for years contains the common proviso, namely, "*that it shall and may be lawful for the lessor to re-enter*," or a proviso, "*that the term shall cease and determine, if the lessor please*,"(*h*) the lease will be only voidable by a breach of covenant; and the forfeiture may then be waived by a subsequent acknowledgment of a tenancy, in the same manner as in all cases of leases for lives.(*i*)

A proviso in a lease to re-enter for a condition broken,

(*h*) *Doe*, d. *Bristow*, v. *Old*, K. B. Sittings after T. T. 1814. M. S.

(*i*) Co. Litt. 215, (*a*). *Pennant's* case, 3 Co. 64, 65.

operates only during the term, and cannot be taken advantage of after its expiration. Thus, where a lease for ninety-nine years, if *A.* and *B.* should so long live, was granted, with a proviso giving the power of re-entry, in case the lessee should under-let the premises for the purpose of tillage, and an under-tenant of the lessee ploughed up, and sowed the land, but the lessor did not enter during the continuance of the estate; it was held in an action of trespass by the lessor against the under-tenant, for entering upon the land, after the determination of the estate, for the purpose of carrying off the emblements, that the plaintiff, having never been in possession by *right of re-entry* for condition broken, could have no advantage thereof, and that the defendant, who ploughed and sowed the land, was entitled to take the emblements.(*j*)

(*j*) *Johns* v. *Whitley*, 3 Wils. 127.

CHAPTER VI.

OF THE ANCIENT PRACTICE; AND THE CASES IN WHICH IT IS STILL NECESSARY.

WHEN the remedy by ejectment is pursued in an inferior court, the fictions of the modern system are not applicable, for inferior courts have not the power of framing rules for confessing lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them.(*k*) When, also, the premises are vacated, and wholly deserted by the tenant, and his place of residence is unknown,(*l*) the modern practice, for reasons which will be noticed in a subsequent chapter,(*m*) cannot be adopted. When, therefore, the party brings his action in a superior court, the possession being vacant,(*n*) and the lessor's

(*k*) *The King* v. *Mayor of Bristow*, 1 Keb. 690. *Sherman* v. *Cocke*, 1 Keb. 795. It is said by *Gilbert*, C B. that if the defendant, in an inferior court, enter into a rule to confess lease, &c. and the cause be removed, and the judge of the inferior court grant an attachment against the defendant for disobedience to the rule, the superior court will grant an attachment against the judge, for exceeding his authority, and obstructing the course of the superior court. (Gilb. Eject. 38.)

(*l*) Strict proof of this fact will be required; and if it appear, that the premises were not *wholly* deserted, or that the plaintiff's lessor knew *where the tenant lived*, a judgment obtained by means of the ancient practice will be set aside. A very little matter has been held sufficient to keep possession, such as, leaving beer in a cellar, or hay in a barn. (*Savage* v. *Dent*, Stran. 1064. *Jones*, d. *Griffiths*, v. *March*, 4 T. R. 464.)

(*m*) Chap. VII.

(*n*) Appendix, No. 7.

abode unknown, and when he is desirous of trying his title in a court of inferior jurisdiction, all the forms of the ancient practice must be observed: a lease must be sealed upon the premises; an ouster actually made; and the parties to the suit will be real, and not imaginary persons.

The manner of proceeding in these cases is as follows. *A.*, the party claiming title, must enter upon the land before the essoign-day of the term of which the declaration is to be entitled, and whilst on the premises, execute a lease of them to *B.*(any person(*o*) who may accompany him,) at the same time delivering to him the possession by some one of the common modes. *C.* (some other person) must then enter upon the premises, and eject *B.* therefrom; and having done so, must remain upon them, whilst *B.* delivers to him a declaration in ejectment, founded upon the demise contained in the lease; and, in all respects, like the declaration in the modern proceedings,(*p*) except that the parties to it are real instead of fictitious persons; *B.* being made the plaintiff, *A.* the lessor, and *C.* the defendant. To this declaration, a notice must be added, signed by *B.*'s attorney, and addressed to *C.*, requiring him to appear and plead to the declaration, and informing him that if he do not, judgment will be signed against him by default.(*q*)[9]

(*o*) Attornies form an exception to this statement; for, by the rules of B. R. and C. B. (M. T. 1654.) it is ordered "that for the prevention of maintainance and brocage, no attorney shall be lessee in an ejectment."

(*p*) Appendix, No. 12.

(*q*) Appendix, No. 8.

[9] The strict principles relative to proceedings in ejectment for a vacant possession in England, do not apply to the unsettled lands in this country. So the Holland Land Company were let in to defend, where a lease had been sealed on the premises. *Saltonstall* v. *White*, 1 Johns. Cas. 221.

But defendant, in such case, must stipulate to admit, that he was in possession at the time of the commencement of the suit. *Wood* v. *Wood*, 9 Johns. 258.

When the landlord, or person claiming title, does not wish to go through this ceremony himself, he may execute a power of attorney, authorizing another to enter for him; (*r*) and the proceedings are then the same as if he himself entered. But it must be remembered, that if it be necessary, when the ancient practice is used, to join the wife in the demise, the lease must be executed by the husband and wife, in their proper persons, because a *feme covert* cannot constitute an attorney.(*s*)

When the ancient practice is resorted to, the suit must proceed in the name of the casual ejector, and if the proceedings are in a superior court, no person claiming title will be admitted to defend the action. If, therefore, in such case, the right to the premises be disputed, the party who seals the lease must, in the first instance, recover the possession, and the other party must afterwards bring a common ejectment against him, to try the title.(*t*)

When the proceedings are in the King's Bench, an affidavit must be made (*u*) of the sealing of the lease, ouster of the plaintiff, &c.; and upon this affidavit a motion is made for judgment against the defendant, and unless he appears and pleads, judgment will be signed against him, upon moving the court, as in a common ejectment.(*v*)

In the Common Pleas, this affidavit and motion are unnecessary, and instead of them a rule to plead must be given

(*r*) 2 Sell. Prac. 131. Appendix, Nos. 5 and 6.

(*s*) *Wilson* v. *Rich*, 1 Yelv 1 S. C. 1 Brown, 134. *Plomer* v. *Hockhead*, 2 Brown, 248. S. C. Noy. 133. *Sed vide Hopkins*, case Cro. Car. 165. *Gardiner* v. *Norman*, Cro. Jac. 617.

(*t*) *Ex parte Beauchamp* and *Burly* Barn. 177. B. N. P. 96.

(*u*) Appendix, No. 9.

(*v*) *Smartley* v. *Henden*, 1 Salk. 255. 2 Sell. Prac. 131.

on the first day of term, as in other actions, and if there be no appearance and plea at the expiration of the rule, judgment may be signed.(*w*)

It is immaterial, as far as the forms of sealing the lease, &c. are concerned, whether the action be commenced in a superior, or inferior court; but the subsequent proceedings in inferior courts must, of course, depend upon the general practice in them in other actions, and cannot form a part of this treatise. How far it may even be *necessary* to give the tenant in possession notice of the claimant's proceedings, in an ejectment brought in an inferior court, may appear doubtful, when it is remembered, that such notice was only requisite in the superior courts, in consequence of a rule made for that particular purpose;(*x*) but it certainly is more *prudent* to conform to the general practice in this respect, and the notice need not to be given until after the entry, and execution of the lease.(*y*)

It seems, that an ejectment cannot be removed from an inferior to a superior court, except by a writ of *habeas corpus;* but it is difficult to discover the principle, upon which the writ of *certiorari* is considered insufficient.(*z*)

When an ejectment is removed from an inferior to a superior court, the tenant in possession is entitled to the same privilege of confessing lease, entry, and ouster, and defending the action, as if the plaintiff had originally declared in the superior court.(*a*)

When the lands lie partly within and partly without the

(*w*) 2 Sell. Prac. 131.
(*x*) *Ante*, 11.
(*y*) 1 Lill. Pr. Reg. 675.
(*z*) *Highmore* v. *Barlow*, Barn. 421. *Allen* v. *Foreman*, 1 Sid. 313.
(*a*) Gilb. Eject. 37.

jurisdiction of the inferior court, the defendant cannot plead above the jurisdiction of such inferior court, because the demise is transitory, and may be tried any where.(*b*)

As the plaintiff, in the ancient practice, is a person actually in existence, his death would, of course, abate the action according to the general rules of law; but as the courts look upon the lessor of the plaintiff to be the person concerned in interest, they will not suffer him to be deprived of his remedy, by such an event. If, therefore, there be any one of the same name with the plaintiff, he will be presumed to have been the person; and it has also been held to be a contempt of the court, to assign for error the nominal plaintiff's death.(*c*)

In like manner, before the introduction of the modern practice, it was said, that if the plaintiff released to one of the tenants in possession, who had been made defendant, such release would be a good bar, because the plaintiff could not recover against his own release, since he was the plaintiff upon the record; but the courts considered such a release as a contempt, and it does not appear that a plea of this nature ever occurred in practice.(*d*)

The casual ejector is, also, in the ancient practice a real person, but the court will not allow him to confess judgment; and where, upon proceedings on a vacant possession, the casual ejector gave a warrant of attorney for this purpose, the court set the judgment aside.(*e*)

Where an action of ejectment, and an action of assault

(*b*) *Hall* v. *Hughs*, 2 Keb. 69. *Anon.* Salk. 260. Vide *Doe*, d. *Byne*, v. *Brewer*, 4 M. & S. 300.
(*c*) *Moore* v. *Goodright*, Stran. 899.
(*d*) *Peto* v. *Checy*, 2 Brown, 128.
(*e*) *Hooper* v. *Dale*, Stran. 531.

and battery, were joined in the same writ, after verdict it was moved in arrest of judgment, because it was without precedent; but the court seemed to think the misjoinder cured by the verdict.(*f*)

(*f*) *Bird* v. *Snell*, Hob. 249. *et vide* Gilb. Eject. 52.

CHAPTER VII.

OF THE DECLARATION IN THE MODERN ACTION OF EJECTMENT, AND NOTICE TO APPEAR.

THE proceedings in the modern action of ejectment being founded in fiction, and regulated altogether by the courts of common law, a system of practice has gradually been formed, adapted to the uses of the particular remedy, but for the most part independent of the general practical regulations in other actions. The singularity of the modern practice has, indeed, occasioned it to be denominated a string of legal fictions; and the remedy itself has frequently been called a child and creature of the Court.

To enable a party claiming title to lands, to take advantage of the modern method of bringing an ejectment, it is necessary, as we have already observed,(*g*) that a person should be in possession of the premises in question; that is to say, that they should not be vacated *and altogether deserted*;(*h*) or at least (supposing them to be so deserted) that the residence of the last tenant be not unknown to the claimant.(*i*) This arises from a particular regulation of the modern practice, which requires an affida-

(*g*) *Ante*, 177.

(*h*) *Savage* v. *Dent*, Strn. 1064. *Jones*, d. *Griffiths*, v *Marsh*, 4 T. R 464.

(*i*) Exceptions to this general rule are created, in particular cases, by the provisions of the statutes 4 Geo. II. c. 28. 11 Geo. II. c. 19. *Vide antè*, 150. 161.

vit of the service of a declaration in ejectment upon the tenant in possession, before judgment can be obtained against the casual ejector; and as this service cannot, of course, take place, when a tenant does not exist, the necessary affidavit cannot then be made, but the claimant is compelled to resort to the ancient practice.

With this single exception, however, a claimant in ejectment may always proceed, in the superior courts, by the modern method.

The suit is commenced by the delivery of the declaration against the casual ejector, to the tenant in possession; for, as the plaintiff and defendant in the action, are only fictitious persons, the suing out of a writ would be an useless form. This declaration is, in fact, in itself a kind of writ, or process; and is the only means by which the party in possession is informed of the claim set up by the lessor, and required to appear and defend his title.(*j*)

The declaration, when the proceedings are in the King's Bench, may be framed to answer either to an action commenced *by bill*, or *by original*, but the latter is the preferable and most common method; because the action is then considered by the Court, as though it actually had been commenced *by original*, and no writ of error can be brought thereon except in Parliament. In the Common Pleas, the declaration is, of course, always framed as if the proceedings were *by original*.(*k*)

(*j*) A declaration in ejectment is so far considered a process of the court, that the court will punish as a contempt any improper conduct of the tenant at the time of its delivery. *Rex* v. *Unitt*, Stran. 567.

(*k*) Appendix, No. 12. 14, 15.

The declaration should regularly be entitled of the term immediately preceding the vacation in which it is delivered; but if it be not entitled of any term, the omission will be immaterial, provided the tenant has sufficient notice given him therein to appear to the action. As where the declaration was delivered before the essoign day of Hilary term, and the notice at its foot was dated Jan. 1, 1818, and was to appear within the four first days of the next term.(*l*)

With respect also to the term of which the declaration against the casual ejector may be entitled, a striking dissimilarity from the practice in all other actions prevails. The demise stated in the declaration, is the title upon which the plaintiff is supposed to enter, and the ouster the supposed wrong for which the action is brought. The plaintiff has, consequently, no cause of action antecedently to the day of the ouster; and according to the general rules of pleading, could not entitle his declaration anterior to that time. But it is otherwise in an ejectment; for the defendant being a nominal person, cannot take advantage of the objection, and if the tenant appear, and apply to be admitted a defendant instead of the casual ejector, he will be compelled by the consent rule to accept a declaration entitled of a subsequent term. Therefore, if the demise be laid in the vacation time, and the declaration against the casual ejector be entitled of the preceding term, it will be sufficient; because, if the party in possession defend the action, the declaration against him (as will be explained hereafter) will be entitled of the subsequent term; and if he leave the suit undefended, judgment will be taken out against the casual ejector.(*m*)

(*l*) *Goodtitle*, d. *Price*, v. *Badtitle*, H. T. 1818. K. B.—M.S.

(*m*) Imp. K. B. 642. 1 Lill. Prac. Reg. 680. *Tunstall* v. *Brend*, 2 Vent. 174.

The *venue* in ejectment is local, and confined to the county in which the lands are situated.(*n*)

The demise declared upon by the plaintiff, in the modern practice, is fictitious only; but still it must be consistent with the title of his lessor; that is to say, such a demise must be supposed to be made, as would, if actually made, have transferred the right of possession to the lessee. Thus, if there be several lessors, and a joint demise by them all be alleged, such a title must be shown at the trial, as would enable each of them to demise the whole; because, if any one of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them. As, where *A.* was tenant for life, and *B.* had the remainder in fee, and they made a lease to C., and declared upon the lease as a *joint demise*, it was held bad; because, during *A.*'s life, it was the lease of *A.*, and the confirmation of *B.*, and after the death of *A.*, it was the lease of *B.*, and the confirmation of *A.*, but not a joint demise.(*o*)

Joint tenants, or parceners, have a sufficient interest in the lands held in joint tenancy, or parcenery,[1] to entitle them to make a joint demise of the whole premises, but tenants in common have not: and the reason for this difference seems to be, that tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also; whilst joint tenants

(*n*) *Anon.* 6 Mod. 222. *Moslyn* v. *Fabrigas*, Cowp. 161. 176.

(*o*) *King* v. *Bery*, Poph. 57. *Treport's* case, 6 Co. 15, (*b*).

[1] Coparceners may sever in ejectment, and one coparcener may bring ejectment on her separate demise. *Jackson* v. *Sample*, 1 Johns. Cas. 23.

and parceners are seised *per my et per tout*, derive by one and the same title, have a *joint possession*, and must join in any action for an injury thereto; so that each of them may properly be said to demise the whole.(*p*)

It is not, however, compulsory upon joint tenants, or parceners, to allege a joint demise; for if a joint tenant, or parcener, bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land. And if all the joint tenants, or parceners, join in the action, but declare upon separate demises by each, it is held, that they may recover the whole premises; because, by the several demises, the plaintiff has the entire interest in the whole subject matter, although the joint tenancy is severed by the separate letting.(*q*)

When two, or more, tenants in common, are lessors of the plaintiff, a separate demise must be laid by each,(*r*)[2] or they must join in a lease to a third person, and state the demise to the plaintiff to have been made by their lessee. The first is the most usual mode of proceeding, and the declaration need not state the several demises to be of the

(*p*) *Moore* v. *Fursden*, 1 Show. 342. *Millener* v. *Robinson*, Moore, 682. *Boner* v. *Juner*, Ld. Raym. 726. *Mantle* v. *Wollington*, Cro. Jac. 166. *Morris* v. *Barry*, 1 Wils. 1. *Heatherly*, d. *Worthington*, v. *Weston*, 2 Wils. 232.

(*q*) *Doe*, d. *Gill*, v. *Pearson*, 6 East, 173. *Roe*, d. *Raper*, v. *Lonsdale*, 12 East, 39. *Doe*, d. *Marsack*, v. *Read*, 12 East, 57. *Doe*, d. *Lulham*, v. *Fenn*, 3 Campb. 190.

(*r*) App. No. 14, 15.

[2] It has been determined by the Supreme Court of the State of New-York, that tenants in common may declare either on a joint or separate demise. *Jackson* v. *Bradt*, 2 Caines' Rep. 169, 175. But were it not for the fiction of lease, entry, and ouster, they could not join; for it is a general rule, that in all actions real and mixed, tenants in common must sever, because they have several freeholds, and claim by several titles. *Ibid.*

several shares belonging to the several tenants respectively; but each demise may be alleged generally to be of the whole premises demanded; for under a demise of the whole an undivided moiety may be recovered.(*r*)[3]

When any doubt exists as to the party in whom the legal title is vested, it is usual to declare upon several distinct demises by the several persons concerned in interest,(*s*) and the claimants will not then be confined at the trial to one particular demise, but will be allowed to resort to any included in the declaration, under which they may be able to prove a title to the premises. Difficulties of this nature frequently occur when trustees are lessors of the plaintiff; and it is always advisable to lay separate demises by the trustees, and *cestui que trust*, unless the effect of the statute of uses upon the trust is most clear and indisputable. But application should, in strictness, be first made to such trustees for permission to make use of their names; and where demises are inserted in the names of any parties without their consent, the court, on motion, will order such demises to be struck out of the declaration, unless the justice of the case should be defeated thereby. But where a plaintiff laid a demise by his assignees, without their permission, (they having given up to him the property in the premises,) and obtained judgment and execution thereupon, the court

(*r*) *Doe*, d. *Bryant*, v. *Wippel*, 1 Esp. 330.

(*s*) Appendix, No. 14, 15.

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[3] In ejectment, separate demises, from several lessors, between whom there is no privity of interest, may be laid in the declaration; and, at the trial, the plaintiff may prove the separate titles to separate parts of the premises, and recover accordingly. For it cannot operate as a surprise on the defendant, and it is a course that should be encouraged to prevent multiplicity of suits. *Jackson* v. *Sidney*, 12 Johns. 185.

refused to set the proceedings aside at the instance of the defendant in the ejectment, notwithstanding an affidavit from one of the assignees, that he knew nothing of the premises in question.(*t*)[4]

The day on which the demise is stated to have been made, is so far material, that it must be subsequent to the time when the claimant's right of entry accrues;[5] for if the lessor have not a right to enter, he cannot have a right to demise the lands, and, consequently, the plaintiff must be nonsuited at the trial; for his lessor cannot *be supposed* to have made an illegal demise.(*u*) It is usual, however, to lay the demise as far back as the lessor's title will admit; because the judgment in ejectment is conclusive evidence as to the title of the lessor, for all the mesne profits accruing subsequently to the day of the demise;(*v*) and when

(*t*). *Doe*, d. *Vine*, v. *Figgins*, 3 Taunt. 440.

(*u*) *Ante*, 10. *Goodtitle*, d. *Galloway*, v. *Herbert*, 4 T. R 680.

(*v*) *Aislin* v. *Parkn*, Burr. 665.

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[4] A lessor may be struck out of the declaration on affidavit of his having no interest in the premises, except under special circumstances. *Jackson* v. *Sclover*, 10 Johns. 368.

If the name of a person is used as lessor without his consent, it may be struck out on application to the court; but if it be not struck out, he is inadmissible as a witness. *Jackson* v. *Ogden*, 4 Johns. 140.

Where a person is made lessor against his consent, and the nominal plaintiff afterwards becomes nonsuit, such lessor is not liable for the costs, but the plaintiff's attorney is liable. *People* v. *Bradt*, 6 Johns. 318.

But where the lessor was brought up on attachment, and denied that he ever consented to have his name used, which was directly denied by contradicting affidavits, Court said that the lessor must pay the costs, and take his remedy over against the attorney, but they respited the recognizance, to give him an opportunity to bring his action against the attorney. *People* v. *Bradt*, 7 Johns. 539.

[5] The demise must be laid at, or subsequent to, the time that plaintiff's right accrued. *Van Allen* v. *Rogers*, 1 Johns. Cas. 283.

there are any doubts as to the period when the lessor's title accrued, it is customary to state different demises by him on different days.

In an ejectment on the demise of an heir by descent, the demise was laid on the day the ancestor died, and held to be well enough; for the ancestor might die at five o'clock, the heir enter at six, and make a lease at seven, which would be a good lease.(*w*) It seems, also, according to Lord *Hardwicke*, that a posthumous son, taking lands under the provisions of 10 and 11 Wm. III. c. 16. would be entitled to lay the demise in an ejectment, from the day of his father's death.(*x*)

It has already been observed, that in an ejectment, by the surrenderee, of copyhold premises, the demise may be laid against all persons but the lord, on a day between the times of surrender and admittance, provided the surrenderee be admitted before trial.(*y*)

But this doctrine of relation does not apply where the assignees of a bankrupt are the lessors of the plaintiff, so as to enable them to recover the freehold lands of the bankrupt, upon a demise subsequently to the act of bankruptcy, but before the date of the bargain and sale by the commissioners; for the freehold remains in the bankrupt, though not beneficially, until taken out of him by the conveyance.(*z*)

In like manner, a conveyance to a creditor of an insolvent debtor's estate by the clerk of the peace, (in whom it

(*w*) *Roe*, d. *Wrangham*, v. *Hersey*, 3 Wils. 274.

(*x*) B. N. P. 105.

(*y*) *Ante*, 66.

(*z*) *Doe*, d. *Esdaile*, v. *Mitchell*, 2 M. & S. 446.

is vested, upon the order for the insolvent's discharge, by the stat. 41 G. III. c. 70. s. 15. until the subsequent conveyance to the creditor,) does not vest such estate in the creditor, by relation, either to the date of the order or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace; and, therefore, such creditor cannot recover in ejectment, upon a demise laid anterior to the execution of the deed, although subsequent to the time when the estate was out of the insolvent debtor, and the order made to convey the same to the lessor.(*a*)

When a pauper has been let into possession of premises by the overseers of a parish, the demise should be laid by the overseers for the time being when the ejectment is brought, if the pauper has done any act recognizing a holding under them; but otherwise by the overseers who let him into possession, or the last set of overseers whom he has acknowledged as his landlords.(*b*)

When a fine with proclamations has been levied, and an actual entry is necessary to avoid it, the demise must be laid on a day subsequent to the entry.(*c*)

Tenancies at will scarcely exist at the present day; but when an ejectment is brought against a tenant at will, the demise must be laid subsequently to the time when possession is demanded, that is to say, subsequently to the determination of the will.(*d*)

(*a*) *Doe*, d *Whatley*, v. *Telling*, 2 East, 256.

(*b*) *Doe*, d. *Grundy*, v. *Clarke*, 14 East, 488.

(*c*) *Berington*, d. *Dormer*, v. *Parkhurst*, And. 125. S. C. Stran. 1086. S. C. Willes, 327. S. C. 13 East, 489.

(*d*) *Ante*, 103.

When an ejectment is intended to be brought against a tenant from year to year, and the time of the commencement of the tenancy is unknown, the only sure method of avoiding a nonsuit is to give a general notice to quit "at the end and expiration of the current year of the tenancy thereof, which shall expire next after the end of one half year from the date of the notice," and to lay the demise eighteen months after the delivery of such notice.(*e*)

The length of the term, during which the premises are alleged in the declaration to have been demised to the plaintiff, is wholly unconnected with the title of the claimant, and may be of longer duration than his interest in the land.(*f*) A contrary doctrine was once, indeed, maintained, upon the principle, that by a judgment in ejectment the plaintiff recovers his *term* mentioned in the declaration, and, therefore, if the term declared on, be of greater duration than the lessor's title, as, for instance, if the lessor be entitled to the lands for three years only, and the plaintiff declare on a demise for five, he would wrongfully hold the lands for the last two years.(*g*) But this doctrine has since been very correctly overruled: because if the lessor have the right of possession but for a month, and make a lease for seven years, it will enure to his lessee for the month duly, and during that time he will be entitled to the possession: and, as a judgment in ejectment is not admitted as evidence of the lessor's title, he cannot by reason of it be enabled to keep possession after the month has expired.(*h*)

(*e*) *Vide post*, chap. 10.

(*f*) *Doe*, d. *Shore*, v. *Porter*, 3 T. R. 13.

(*g*) *Roe* v. *Williamson*, 2 Lev. 140. S. C. 3 Keb. 490.

(*h*) B. N. P. 106. *Clerke* v. *Rowell*, 1 Mod. 10.

Seven years is the term usually declared upon; and the only direction necessary to be given upon this point is, that the term be of a length sufficient to admit of the lessor's recovering possession of the land before its expiration; although the courts are now very liberal in permitting lessors to amend in this respect, as will be stated hereafter.

It was for some time, even after the introduction of the modern practice, holden necessary, that when an ejectment was brought by a corporation aggregate, they should execute a power of attorney, authorizing some person to enter and make a lease on the lands; that such person accordingly should enter, and make a lease under seal; and that the declaration should state the demise to be by deed.(*i*) These forms, it seems, were deemed necessary upon the principle, that a corporation aggregate cannot perform any corporate act otherwise than under the corporation seal, nor make an attorney, or bailiff, but by deed. They could not, it was therefore said, enter and demise upon the land in person, as natural persons could; nor substitute an attorney to enter into a rule for their costs; nor would an attachment go against them for disobedience to that rule. They therefore made an actual lease upon the lands, and then the attorney proceeded in the common method. But, since the principles of this action have been more clearly understood, none of these peculiarities are necessary; and the demise may now be laid in the general way, without any power of attorney being made, any lease being signed,(*j*) or any statement of such a lease being introduced into the declaration. One case only is indeed to be found upon the latter point, and in that, the question arose after

(*i*) Gilb. Eject. 35.

(*j*) *Furley*, d. *Mayor of Canterbury*, v. *Wood*, 1 Esp. 198.

the verdict;(*j*) but from the reasoning then used by the court, no doubt can be entertained that the principle would be extended to every stage of the action; and that a plaintiff in ejectment would never be nonsuited for the omission of such a statement.(*k*) The demise is still certainly sometimes stated to be by deed; and it is immaterial whether it be so or not, as, notwithstanding the statement, no proof of the deed is required.(*l*)

If a corporation be aggregate of many, they may set forth the demise in the declaration, without mentioning the Christian names of those who constitute the corporation; but if the corporation be sole, as if the demise be by a bishop, the name of baptism must be inserted. The reason of this is, that in the first case the name solely consists of its character, but in the last, in its person; therefore, there cannot be a sufficient specification of that person without mentioning his name.(*m*)

In the case of *Swadling* v. *Piers*,(*n*) it was ruled, that in an ejectment for tithes, the plaintiff must declare on a demise by deed, because tithes cannot pass but by deed; but this decision has since been overruled, and the statement of a deed seems even in this case to be no longer necessary.(*o*)

(*j*) *Partridge* v. *Ball*, Ld. Raym. 136. S. C. Carth. 390.

(*k*) In the case of *Doe*, d. *Dean and Chapter of Rochester*, v. *Pierce*, the demise was in the common form, and many objections were taken upon other points by the defendant's counsel, and overruled; but they never adverted to the circumstance of the demise not being stated to be by deed. (Kent Sum. Ass. 1809, M. S.)

(*l*) *Furley*, d *Mayor of Canterbury*, v. *Wood*, 1 Esp. 198.

(*m*) *Carter* v. *Cromwell*, Sav. 128, cited, *Dyer*, 86.

(*n*) Cro. Jac. 613.

(*o*) *Partridge* v. *Ball*, Ld. Raym. 136. S. C. Carth. 390.

It seems also to have been holden, that on a demise by the master and fellows of a college, dean and chapter of a cathedral, master or guardian of an hospital, parson, vicar, or other ecclesiastical person, of any lands, &c. the declaration should state that there was a rent reserved, &c. pursuant to the statute 13 Eliz. c. 10.; but this form cannot now be necessary.(*p*)

A similar doctrine was once applied to the case of an infant;(*q*) but it has been long settled, that an infant may make a lease without rent to try his title.(*r*) When, however, a demise is laid by an infant, his father, or guardian, should be made plaintiff, instead of a nominal person, in order to save the trouble and expence of giving security for the costs, which he would otherwise be compelled to do.(*s*)

It is not necessary to state, in the declaration, that the premises are situated in a parish, hamlet, &c.; it is sufficient to mention the name of the place in which they are situate, without also describing it by the name of its ecclesiastical or civil division.(*t*) And in one case, where even the name of the place was omitted when describing the premises, but such name could be collected from other parts of the declaration, the Court held the description to be sufficiently certain.(*u*) When, however, the premises

(*p*) *Carter* v. *Cromwell*, Sav. 129.

(*q*) Lill. Prac. Reg. 673.

(*r*) *Zouch* v. *Parsons*, Burr. 1794. 1806.

(*s*) *Noke* v. *Windham*, Stran. 694. Anon. 1 Wils. 130.

(*t*) *Goodtitle*, d. *Bembridge*, v. *Walter*, 4 Taunt. 671.

(*u*) *Goodright*, d. *Smallwood*, v. *Strother*, Black. 706. The declaration in this case stated, that one M. S. "*at Haswell in the county of B.*" demised to plaintiff two messuages, from which messuages defendant *at Haswell aforesaid*, ousted plaintiff; and the Court considered, that the statement of the

are described as lying in a parish, hamlet, &c. such description must be a correct one, and an uncertain or improper description will be fatal. Thus, in an ejectment for lands, "in the parishes of *A.* and *B.*, or one of them," the judgment was arrested for the uncertainty, although it appeared that the parishes had originally been one, and lately been divided by an act of parliament, and that the boundaries were not settled.(*v*) But if the words "or one of them" had been omitted, it seems the description would have been sufficient, though all the lands were contained in one of the parishes.(*w*)

Where the premises were described as situate "*in the united parishes of St. Giles in the Fields, and St. George, Bloomsbury*, and it appeared that those two parishes were united together by Act of Parliament, for the maintaining of their poor, but for no other purpose, the variance was held fatal; for by the description, the parishes were stated as if they were completely blended together, and formed only one parish, when, in truth, they remained entirely distinct, except as to the maintenance of the poor.(*x*) But

ouster being *at Haswell*, amounted to a sufficient certainty that the lands demised lay *at Haswell*.

(*v*) *Goodright* v. *Fawson*, 7 Mod. 457. S. C. Barn. 184. *Cottingham* v. *King*, Burr. 624. and the authorities there cited.

(*w*) *Goodwin* v. *Blackman*, 3 Lev. 334. In this case the ejectment was "for a tenth part of a messuage in *D.* and *F.*" and the whole messuage appearing in evidence to lay in *D.*, and no part in *F.*, the description was held ill, because it was, "precisely of the tenth part of an entire thing;" though it was said by the court, that if the ejectment had been of an acre of land in *D.* and *F.*, and it appeared that the whole acre was in *D.*, it would be well enough. The reason for this diversity seems to be, that *the acre* being the whole thing demanded, the description is sufficiently certain, although it all be in one parish; whereas, when only *a tenth part* is demanded, it is uncertain which tenth part is meant, and, therefore, as no tenth part answers the description, the sheriff could not give execution; *tamen quære et vide* Burr. 330. *et ante*, 20.

(*x*) *Goodtitle* v. *Pinsent*, d. *Lammiman*, 2 Campb. 274. S. C. 6 Esp. 128.

where the premises were described as situate *in the parish of West Putworth and Bradworthy*, and it appeared that *West Putworth* and *Bradworthy* were separate parishes, the Court held the description to be sufficiently certain, rejecting the word *parish* as surplusage, and considering the demise as of lands in *West Putworth* and *Bradworthy*.(*y*) And where the premises were laid to be at the parish of *Farnham*, and were proved at the trial to be in the parish of *Farnham Royal*, it was held not to be a fatal variance, unless it could be proved that there were two *Farnhams*.(*z*)

When the premises lie in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description of them as lying in the other parish; but it seems sufficient to enumerate them once only, describing them as lying in the parishes of *A.* and *B.*, or in *A.* and *B.* respectively.(*a*)

The number of messuages, acres, &c. mentioned in the demise, need not correspond with the number to which the lessor claims title. He may declare for an indefinite number, as a hundred messuages, a thousand acres of arable land, &c.; and care should be taken that the number specified in the demise be larger than the number claimed; because, although if he declare for *more* than he is entitled to, he may recover less, the reverse will not hold.(*b*) Upon the same principle, if the lessor of the plaintiff be entitled to a moiety, or other part, of an entire thing, as the half,

(*y*) *Goodtitle*, d. *Brembridge*, v. *Walter*, 4 Taunt. 671.

(*z*) *Doe*, d. *Tollet*, v. *Salter*, 13 East, 9.

(*a*) 2 Chitty, Prec. 395.

(*b*) *Denn*, d. *Burgis*, v. *Purvis*, Burr. 326. *Guy* v. *Rand*, Cro. Eliz. 13.

or third part, of a house, he may recover such moiety, or third part, on a demand for the whole.(*c*)

The entry of the plaintiff on the land need not be alleged in the declaration, to be made on any particular day, although in the precedents it is usually so stated. It is sufficient if it be declared generally, that the plaintiff entered by virtue of the demise: nor does it seem to have been required, even in the ancient practice, to be more explicit, because, as the plaintiff entered *by virtue* of the lease, he must necessarily have entered after his title accrued; though it was then said, that it might have been otherwise, if the declaration had been *prætextu cujus* he entered, for the plaintiff might enter unlawfully, or before his time, under pretence of the lease.(*d*)

The day upon which the ouster of the plaintiff, by the casual ejector, is alleged to have taken place, should regularly be after the commencement of the supposed lease and entry. This is requisite, in order to support the consistency of the fiction; because, as the title of the plaintiff is supposed to arise from the lease mentioned in the declaration, it would be absurd for him to complain of an injury to his possession before, by his own showing, he had any claim to be possessed. But it does not seem absolutely necessary that this consistency should be preserved; for, as the words "*afterwards, to wit,*" are always used immedi-

(*c*) *Ablett* v. *Skinner*, 1 Siderf. 229. *Goodwin* v. *Blackman*, 3 Lev. 334. In an ancient case it is said, that if an ejectment be brought for an acre of land, and the metes and bounds be described in the declaration, and the jury find the defendant guilty in half an acre of land, the verdict will be bad; because of the uncertainty of which part, or moiety, the plaintiff is to have execution. (*Winkworth* v. *Mann*, Yelv. 114, *tamen quære, et vide ante*, chap. 2.)

(*d*) *Wakeley* v. *Warren*, 2 Roll. Rep. 466. *Sed vide Douglas* v. *Shank*, Cro. Eliz. 766.

ately before mentioning the day of the ouster, it is most probable, upon the principles by which ejectments are at present regulated, that the courts would in all cases consider an ouster laid previously to the day of the entry, "as impossible and repugnant," and as such reject it.(*e*) Even when the old practice prevailed, and the true principles of the remedy were so little understood, every possible intention was made in favour of the plaintiff, when an ouster was alleged anterior to the time of the demise. Thus, on a demise from the 1st of February, 1752, to hold from the 8th of January before, and that afterwards, namely, on the 28th of January, 1752, defendant ejected him, and it was insisted for the defendants, that the plaintiff's title did not commence until the 1st of February, and, therefore, that the ouster was laid too soon; the court held, that the day of the ouster, being laid under a *scilicet*, was surplusage, and that "*afterwards*" should relate to the time of making the lease, and then all would be well enough.(*f*) In like manner, on a demise from the 6th of May, *anno septimo*, by virtue of which plaintiff entered, and was possessed until afterwards, on the 18th of the *same* month, *anno sexto supradicto*, defendant ejected him, the court held the declaration sufficient; because the ouster was laid to be on the 18th of the *same* month, which it could not be if it were done in the sixth year, and rejected the word *sexto* as inconsistent and void.(*g*) Upon the same principle, where the demise was on the *sixth* of September, 2 Jac., by virtue of which the plaintiff held, until afterwards, (to wit) on the *fourth* day of September, 2 Jac., defendant ejected him, the declaration was holden good, and the words under the *scilicet* rejected as surplusage.(*h*)

(*e*) *Adams* v. *Goose*, Cro. Jac. 96. B. N. P. 106.

(*f*) B. N. P. 106.

(*g*) *Davis* v. *Purdy*, Yelv. 182.

(*h*) *Adams* v. *Goose*, Cro. 96. Some old ejectment cases are to be found

From the case of *Merrell* v. *Smith*,(*i*) it does not seem necessary to allege any particular day for the ouster, provided it appears from the declaration to be subsequent to the commencement of the term, and prior to the bringing of the action; but in the precedents a day certain is always laid, and it is the better method to mention a particular day.

With respect to the ouster in an ejectment for tithes, it is said, in the case of *Worrall* v. *Harper*,(*j*) that where the ouster was set forth to have been made in the month of May, it was held ill, because there were no tithes to be ousted of at that season of the year; but this doctrine is controverted by *Gilbert*, C. B., on the principle, that the law does not judicially take notice of the time when tithes arise.(*k*)

Of Amending the Declaration.

It was formerly the practice, both in the King's Bench and the Common Pleas, not to permit the declaration in ejectment to be amended, until the landlord, or tenant, had been made defendant instead of the casual ejector;

in the books, (*Goodgain* v. *Wakefield*, 1 Sid. 7. *Evans* v. *Croker*, 3 Mod. 198. *Stephens* v. *Croker*, Comb. 83. *Higham* v. *Cooke*, 4 Leon. 144. *Osborn* v. *Rider*, Cro. Jac. 135. *Llewelyn* v. *Williams*, Cro. Jac. 258. *Clayton's* case, 5 Co. 1.) in which the ousters were laid on the same days as the demises, and which were decided upon the distinctions formerly taken, as to the time of the commencement of a demise, when stated in the lease to be "from the date," and when from "the day of the date" of the lease; but, since the judgment in *Pugh* v. *Duke of Leeds* (Cowp. 714.) by which it has been determined, that these expressions shall be construed indifferently, either *inclusively*, or *exclusively*, so as to give effect to the deed, these cases can no longer be authorities.

(*i*) Cro. Jac. 311. Jenk. 341.

(*j*) 1 Roll. Rep. 65.

(*k*) Gilb. Eject. 67.

and, consequently, if the defects were such as to prevent the courts from granting the common rule for judgment against the casual ejector, the plaintiff's lessor was compelled to discontinue the action, and resort to a new ejectment.(*l*) But this practice is inconsistent with the present mode of regulating the remedy; and the court would, it is presumed, now permit the lessor to amend his declaration before appearance, provided such amendment did no injustice to the tenant. Indeed, in a recent case, where, by mistake, the name of the tenant in possession was inserted at the commencement of the declaration, instead of that of the casual ejector, (the declaration and notice to appear being in other respects regular,) the court granted the rule for judgment upon the common affidavit of service, and *suggested*, that if the tenant did not appear to the action, an application should be made to amend the declaration.(*m*)

It is also said that, even after appearance, the declaration can be amended in *form* only, and not in *matter of substance;* but it is now difficult to point out what errors would be deemed substance, and not amendable. Under the strict rules, by which the action was formerly conducted, the demise, the length of the term, the time of the ouster, &c.(*n*) were all considered as matters of sub-

(*l*) *Roe*, d. *Stephenson*, v. *Doe*, Barn. 186.

(*m*) *Doe*, d. *Cobbey*, v. *Roe*, K. B. T. T. 1816. MS.

(*n*) Formerly when a person declared in ejectment in the Common Pleas, it was the course of the court, that after imparlance he should make a second declaration; and, when this practice prevailed, if the plaintiff, by his first declaration, had laid the ouster before the commencement of his term, or omitted any other matter of substance, though the second declaration were correct, he could not recover; because the declaration on the imparlance roll was the material one on which the action was grounded.—(*Merrell* v. *Smith*, Cro. Jac. 311.—Jenk. 341.)

stance ;(*o*) and so unbending were the courts upon these points, that if the term expired, pending the action, by injunction from the Court of Chancery at the defendant's application, or by the delay of the court, in which the action was brought, in giving judgment, the lessor was obliged to resort to a new ejectment.(*p*)[6]

(*o*) *Doe*, d. *Hardman*, v. *Pilkington*, Burr. 2447, and the cases there cited.

(*p*) *Anon.* Salk. 257. S. C. 6 Mod. 130. *Scrape* v. *Rhodes*, Barn. 8. *Driver* v. *Scratton*, Barn. 17. *Kesworth* v. *Thomas*, And. 208. *Thrustout* v. *Gray*, Cas. Temp. Hard. 165.

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[6] A new demise may be added on terms, viz. that the defendant have twenty days, after service of amended declaration, to elect whether he will continue to defend the suit; and if he do, then to have the usual costs of amendment, and twenty days from the time of election, to plead *de novo*, or abide by former plea, and if he elect to proceed no further, to have costs up to time of making such election. 2 Caines, 260, 261. Coleman's Cas. 49.

After six years service of the declaration, leave was given to add new demises on the plaintiff's paying all the costs already incurred, in case the defendant should choose to relinquish his defence. *Jackson* v. *Kough*, 1 Caines, 251.

The plaintiff will not be permitted to amend, by inserting a demise from a person having no subsisting title to the premises; for if any person, who may once have had a title, is to be made lessor, the burthen of deducing a title from him, is unreasonably taken from the plaintiff, and thrown on the tenant. *Jackson* v. *Richmond*, 4 Johns. 483.

Defendant, previous to entering into consent rule, was allowed to have the demise of a lessor, who had died before the commencement of the suit, struck out of the declaration. *Jackson* v. *Ditz*, 1 Johns. Cas. 392. *Jackson* v. *Bancraft*, 3 Johns. 259.

The application may also be made after entering into the consent rule. *Jackson* v. *Reynolds*, 1 Caines' Rep. 21. *Ditzads* v. *Butler*, Coleman's Cas. 102.

Where, on application of the defendant, a demise is ordered to be struck out of the declaration, he must serve a copy of the rule for amendment on the plaintiff, which shall be deemed an actual amendment as to all subsequent proceedings on the part of the plaintiff; and the defendant, without a new copy of the declaration being served on him, must enter into the consent rule, and plead in twenty days after service of the certified copy of the rule for the amendment, unless otherwise ordered by the court, and the rule shall be sufficient to authorize an actual amendment of the declaration on file, or to file a new one in its stead, whenever it may become necessary. *Jackson* v. *Belknap*, 7 Johns. 300.

A more liberal principle has, however, of late years been adopted; and the demise, term, &c. are now most correctly considered as formal only, and may be amended if necessary. Thus, in an ejectment to recover lands, forfeited by the levying of a fine, where the demise was laid anterior to the time of the entry to avoid the fine, and the suit was staid, by injunction in the Court of Chancery, for more than five years after the fine was levied, so that the lessor was not in time to make a second entry, or bring a second ejectment, the court permitted him to change the day of the demise, to a day subsequent to the day of the entry: Lord *Mansfield* observing, that the demise was a mere matter of form, and did not exist.(*q*) And in a recent case, where the ejectment was brought upon a forfeiture, and the demise was laid on a day anterior to the time when the forfeiture was committed, the court permitted the lessor of the plaintiff to amend (upon payment of the costs of the application) after the record was made up, and the cause set down for trial.(*r*) But this permission is not to be extended to the injury of the defendant, and therefore the court will not suffer the day of the demise to be altered to a day subsequent to the day of the delivery of the declara-

(*q*) *Doe*, d. *Hardman*, v. *Pilkington*, Burr. 2447.

(*r*) *Doe*, d. *Rumford*, v. *Miller*, K. B. H. T. 1814. MS.—This case seems to carry the principle of allowing an amendment of the demise in an ejectment to its utmost limit. The ejectment was brought upon a covenant to finish certain buildings in a workmanlike manner before the *29th of Sept.* 1313 The demise was laid *on the 26th day of March*, 1813, and the declaration delivered *on the 29th of Oct.* 1813. The tenant appeared in the regular course, and the issue was made up, and the cause set down for trial, at the first Sittings in Middlesex, in Hilary Term, 1814; but being entered late in the paper, stood over until the second Sittings. Two days before the second Sittings, a rule to show cause why the day of the demise should not be altered to the 30th of Sept. was obtained by the plaintiff, which rule was made absolute immediately before the rising of the court on the morning of the second Sittings.

tion, for this would be to give the lessor of the plaintiff a right of action which did not subsist at the time of the commencement of his suit.(*s*)

The term, also, has been enlarged after its expiration, upon payment of costs, although the issue was made up, the special jury struck, and the cause gone down to trial, before the mistake was discovered; the Court considering, that it was a plain mistake in the declaration, and might be amended by the writ, which spoke of a term not yet expired.(*t*) An enlargement of the term was also permitted, by Lord *Mansfield*, in a case where a judgment in ejectment in Ireland had been affirmed, upon a writ of error, in the King's Bench in England, but, from various delays, the term in the declaration had expired before the plaintiff's lessor could obtain possession.(*u*)

When the old principles of the action prevailed, and the term was considered substance, and not amendable, the plaintiff was not nonsuited if the term expired before the trial, but was permitted to proceed for his damages and costs, though not for the recovery of his land; for the right to damages for the ouster remained, although the right to possession upon the lease was determined. It is not probable, at the present day, that opportunity will be offered to raise a point of this nature; but if the lessor of the plaintiff should act so negligently as to proceed to trial upon an expired term, there seems no reason why the above-mentioned principle should not be applicable to the modern practice.(*v*)

(*s*) *Doe*, d. *Foxlow*, v. *Jeffries*, K. B. M. T. 1814.—MS.

(*t*) *Roe*, d. *Lee*, v. *Ellis*, Blk. 940.

(*u*) *Vicars* v. *Heydon*, Cowp. 841.

(*v*) *Capel* v. *Saltonstall*, 3 Mod. 249.

In the case of *Goodtitle* v. *Meymott*, the court refused to amend a declaration, in which "the said James," instead of "the said John," was said to enter by virtue of the demise; and a case was cited, by *Wright*, J., in which the premises were laid to be in Twickenham, or Isleworth, "or one of them," and the court refused to let the plaintiff amend, by striking out the disjunctive words; but it seems that amendments have since been permitted, both in the parcels and the names.(*w*) And, in a recent case, where after issue joined, a summons was taken out to show cause why the declaration and issue should not be amended, upon payment of costs, by altering the parish, from *the parish of G.*, to "*the parish of St. John in G.*," the judge permitted the amendment, and refused to allow the party to plead *de novo*, notwithstanding the case of *Goodtitle* v. *Meymott*.(*x*)

Of the Notice to Appear.(*y*)

The name of the tenant in possession must be prefixed to the notice; and, when the possession of the disputed premises is divided amongst several, it is usual to prefix the names of all the tenants, to each separate declaration; although it does not seem necessary to prefix more than the name of the individual tenant, upon whom the particular declaration is served.(*z*)

The notice must require the tenant to appear, and apply to the court to be admitted defendant instead of the casual ejector, within a certain time after the declaration is delivered; and the time when the notice should require the

(*w*) 2 Sell. Prac. 143.

(*x*) *Doe*, d *O'Connell*, v. *Porch.*— *Coram Heath*, J. Trin. Vac. 1814. MS.

(*y*) Appendix, No. 13.

(*z*) *Roe*, d. *Burlton*, v. *Roe*, 7 T. R. 477.

tenant to appear and make this application, is regulated by the locality of the premises.

When the premises are situated in London, or Middlesex, the notice should be for the tenant to appear "on the first day," (not the essoign day,)(*a*) or "within the four first days" of the term next after the delivery of the declaration; and this mode of expression should be strictly observed; for, although where the notice was to appear "in the beginning of the term," the court granted a rule for judgment against the casual ejector;(*b*) yet, where the notice was to appear "on the morrow of the Holy Trinity," the judgment against the casual ejector was set aside, upon the principle, that the notice was designed to inform the *lay gents.* of the time of appearing, and should therefore be expressed in such terms as they might understand.(*c*) It will, however, be sufficient if the notice be to appear *generally* of the term; but the tenant will then have the whole term to appear in.

The notice usually specifies the term by name, in which the tenant is to appear, and the declaration should regularly be entitled of the term preceding; but, in a very recent case, where a declaration, delivered in *Hilary* vacation, was entitled of *Easter* term, and the notice was to appear on the first day of *next* term, the court granted the rule absolute for judgment against the casual ejector in the first instance during *Easter* term, considering that the tenant could not be misled by the wrong title to the declaration, so as to imagine he had until *Trinity* term to appear, inasmuch as

(*a*) *Holdfast* v. *Freeman*, Stran. 1049.

(*b*) *Tredder* v. *Travis*, Barn. 175.

(*c*) Sel. N. P. 640.

the declaration was delivered, and the notice dated on a day antecedent to the essoign day of *Easter* term.(*d*)

When the premises are situated in any other county than London, or Middlesex, the notice should regularly require the tenant to appear generally in the term next ensuing the delivery of the declaration; but it will be sufficient when the proceedings are in the Common Pleas, if it require him to appear in the *issuable* term, next ensuing such delivery, althongh a nonissuable term intervene. Thus, when a declaration is entitled of *Trinity* term, and delivered during the long vacation, the notice may require the tenant to appear in *Easter* term.(*e*)

The declaration must be delivered before the essoign day of the term, in which the notice is given to appear.(*f*)

The notice should regularly be subscribed with the name of the casual ejector, and formerly proceedings have been set aside for an irregular signature; but it is now sufficient, though certainly not correct; if the notice be subscribed with the name of the plaintiff in the action.(*g*)[7]

One case only is extant, in which an amendment has

(*d*) *Anon.* K. B. E. T. 1817. MS.

(*e*) *Doe*, d. *Clarke*, v. *Roe*, 4 Taunt. 738.

(*f*) *Doe*. d. *Bird*, v. *Roe*, Barns. 172.

(*g*) *Peaceable* v. *Troublesome*, Barn. 172. *Hazlewood*, d. *Price*, v. *Thatcher*, 3 T. R. 351.

[7] Defendants moved to set aside the rule to appear, for a misdirection in the notice to the tenants in possession, and in their notice of motion, referred to the declarations and notices served. The court ruled, that they must produce the declarations and notices served upon them, or the affidavit of due service would be sufficient. *Jackson* v. *Stiles*, 1 Caines' Rep. 501.

been made, by rule of court, in the notice subscribed to the declaration; although it cannot be doubted that any amendments would now be allowed, which the justice of the case might require. In the case above alluded to, the lands were situated in Devonshire, and the notice was for the tenant to appear in *Michaelmas* term, when, according to the practice in country causes at that time, it should have been to appear in an issuable term, and the affidavit stated, that if the lessor were not permitted to amend, he would be barred, by the statute of limitations, from bringing a new ejectment: the court permitted the lessor to amend upon payment of costs.(*h*)

(*h*) *Doe*, d. *Bass*, v. *Roe*, 7 T. R. 469. It is singular, that a practice should have obtained of giving notices to tenants to appear in *nonissuable*, as well as *issuable* terms, and that such change of practice should not have been noticed in any of the reported cases.——See 1 Caines' Rep. 501. and *Ib.* 249.

CHAPTER VIII.

OF THE SERVICE OF THE DECLARATION, AND PROCEEDINGS TO JUDGMENT AGAINST THE CASUAL EJECTOR, WHEN NO APPEARANCE.

THE declaration in ejectment being a kind of process to bring the party interested into court, its delivery to the tenant resembles the service of a writ, rather than the delivery of a declaration ;[8] and, as it is the only warning which the tenant in possession receives of the proceedings of the claimant, the courts are careful that a proper delivery be made, and that the nature and contents of the declaration be explained at the time, to the party to whom it is delivered. This delivery and explanation are generally termed *the service of the declaration;* and our next inquiry will be directed to the different modes by which this service may be made.

The service, to be strictly regular, should be made personally upon the party in possession of the premises, at the time of the service; or, when the possession is divided

[8] Serving the declaration is the commencement of the action, as much as the service of a *capias ad respondendum* in a personal action. *Baron* v. *Abeel*, 3 Johns. 482.

amongst several, upon each party separately.(*i*) When the ejectment is brought by a landlord against his tenant, and the tenant has underlet the premises, the same rule prevails, and the service should be upon the under-tenant. A service upon the original tenant might, perhaps, be sufficient; but a doubt exists upon the point, and it is, therefore, more prudent to serve the under-tenant. If, however, the service is upon the original tenant, and he appears and pleads, he cannot afterwards release himself from the action, upon the ground that his under-tenants, and not himself, are in possession;(*j*) and, from the language of the Court, when giving judgment upon this point, it seems an inference may be drawn, that a service on the original tenant will also be sufficient to warrant a judgment against the casual ejector.[9]

When personal service can be effected, it is immaterial whether it be upon the premises demised, or elsewhere.(*k*)

It frequently, however, happens, from the wilful or accidental absence of the tenant, or some other circumstance, that the claimant is unable to serve him personally: the declaration is then delivered to one of the family, nailed to the door of the house, or in some other manner left upon the demised premises; and, when any of these irregularities

(*i*) B. N. P. 98.
(*j*) *Roe* v. *Wiggs*, 2 N. P. 330.
(*k*) *Savage* v. *Dent*, Stran. 1064. *Taylor* v. *Jefts*, 11 Mod. 302.

[9] A declaration in ejectment was served on the tenant, who soon after quitted the possession, and was succeeded by another tenant, when a person, acting as the plaintiff's agent, served a second declaration on the new tenant. The plaintiff's attorney, being ignorant of the second service, proceeded under the first declaration, and took judgment against the casual ejector. The Court held, that the second declaration was a waiver of the first, and set aside the proceedings with costs. *Kemble* v. *Fitch*, 1 Johns. Cas. 414.

happen, the service will be considered good, or otherwise, according to the particular circumstances of the case.[1] The power exercised by the courts in this respect is altogether discretionary; and it will be necessary to enter rather largely into a detail of the cases, in order to give a clear idea of the principles upon which they have been decided.

When the declaration is explained to, and left with, the wife upon the premises, or at the husband's house elsewhere, it will be good service;(*l*) and, as the husband is answerable for the default of the wife, no evidence seems necessary of a subsequent delivery of the declaration from her to him. It seems, also, that service on the wife will be good any where; provided it be sworn, in the affidavit of service, that she and her husband were living together as man and wife when the service was made.(*m*) But the mere acknowledgment of the wife, that she has received a declaration in ejectment, and given it to her husband, if it be not personally served upon the wife, will not be good service;(*n*) although, in a case in the Common Pleas, where the service was upon the daughter before the essoign day, and on a subsequent day, the wife acknowledged that she had received the declaration, and *showed it to the attorney, who then read it over to her, and explained it*, upon which

(*l*) *Doe*, d. *Baldam*, v. *Roe*, 2 B. & P. 55 *Goodright*, d. *Jones*, v. *Thrustout*, W. Blk. 800. *Doe*, d. *Morland*, v. *Baylis*, 6 T. R. 765.

(*m*) *Jenny*, d. *Preston*, v. *Cutts*, 1 N. R. 308.

(*n*) *Goodtitle*, d. *Read*, v. *Badtitle*, 1 B. & P. 384.

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[1] Where a totally informal declaration, with the names of the town and county blank, was served on the tenants, it was held to be sufficient notice to put them upon inquiry, and a subsequent rule to amend affixed in the clerk's office, was adjudged to be good service. *Jackson* v. *Stiles*, 1 Caines' Rep. 249. and especially when a statute of limitations was about to attach.

the wife said, that the paper should be sent to her husband, the service was held sufficient.(*o*)

The court were at first much inclined to refuse the rule, in this latter case; because it did not clearly appear from the affidavit, that the declaration came to the hands of the wife before the essoign day of the term, but ultimately made the rule absolute on the authority of the case of *Goodtitle*, d. *Massa*, v. *Thrustout*.(*p*) In the court of King's Bench, such an omission would be a fatal objection to the service.(*q*)

When two tenants are in possession of the same premises, service upon one of them will be good service upon both;(*q*) but service upon the wife of one of two tenants in possession will not bind the co-tenant.(*r*)

Service of the declaration upon the child, or servant, of the tenant, will be held sufficient service by the court of Common Pleas; provided it appears from the affidavit, that the declaration was delivered on the premises before the essoign day of the term,(*s*) and that the tenant has since acknowledged the receipt of such declaration; but in the court of King's Bench it must also appear, upon the affidavit, that the tenant has acknowledged himself to have received such declaration, or to have known of the service thereof, previously to the essoign day of the term.(*t*)

Where the ejectment was brought for a house, which

(*o*) *Smith*, d. Lord *Stourton*, v. *Hurst*, 1 H. Blk. 644.

(*p*) Barn. 183.

(*q*) *Doe*, d. *Bailey* v. *Roe*, 1 B. & P. 369.

(*r*) Wood, L. & T. 463.

(*s*) *Smith*, d. *Lord Stourton*, v. *Hurst*, 1 H. Blk. 644.

(*t*) *Roe* d. *Hambrook*, v. *Doe*, 14 East, 441. *Doe*, d. *Wilson*, v. *Roe*, T. T. 1815.—MS.

was rented by the churchwardens and overseers of the parish, for the purpose of accommodating some of the parish poor, a service of the declaration upon the churchwardens and overseers was held sufficient, although they did not occupy the house, otherwise than by placing the poor in it.(*u*) And in an ejectment for a chapel, the service may be made on the chapel-wardens, or on the persons to whom the keys are intrusted.(*v*) But where the ejectment is for a house, service upon the person having the charge of the keys in order to let the house, will not be good service ;(*w*) and service upon a person appointed by the Court of Chancery to manage an estate for an infant, although the estate consisted of a large wood, of which no tenant was in possession, has also been held insufficient, as being nothing more than a service on a gentleman's bailiff.(*x*)

In the preceding cases no wilful opposition appears on the part of the tenant, to the service of the declaration ; and such of the services already mentioned as are considered good, are called *regular services ;* but when the tenant absconds, or does any act which shows a resolution not to receive the declaration, the Court, upon affidavit of facts, will sometimes allow that to be good service, which otherwise would be deemed *irregular.*

Thus, a tender of the declaration, and reading the notice aloud, although the tenant refuse to receive it, or run away and shut the doors, or threaten with a gun to shoot the person serving it, if he should come near ; throwing the declaration in at the window, sticking it against the door,

(*u*) *Tupper*, d. *Mercer*, v. *Doe*, Barn. 181.

(*v*) Run. Eject. 136.

(*w*) *Anon.* 12 Mod. 313.

(*x*) *Goodtitle*, d. *Roberts*, v. *Badtitle*, 1 B. & P. 385.

or leaving it at the house, upon the servants refusing to call their master, and the like, have, upon application to the court, been holden sufficient. So, also, a tender of the declaration in the shop, and reading the notice aloud there to the wife, when the tenant refused to receive the declaration; delivering it to the niece of the tenant, she being the manager of the house, and the tenant having absconded; nailing the declaration on the barn door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house on the premises, and the tenant not to be found at his last place of abode, have respectively been considered good and sufficient services.(*y*)

In a case where the tenant in possession was personated, at the time of the service, by another, who accepted the service in her name, the Court granted a rule to show cause, why this should not be deemed good service upon the tenant herself, and why judgment should not be signed against the casual ejector, in default of her appearing: and that, leaving a copy of this rule at her house, with some person there, or, if no one was to be met with, affixing it to the door, should be good service of such rule. And this rule was afterwards made absolute, upon an affidavit, "that the tenant was either not at home, or (if at home) was denied; and, that her servant-maid was at home, but could not be served; whereupon a copy of the rule was affixed to the door of the house;" and moreover, "that at a subsequent

(*y*) *Douglass*, v. ——, Stran. 575. *Smalley* v. *Neale*, Barn. 173. *Halsal* v. *Wedgwood*, Barn. 174. *Doe*, d. *Dry*, v. *Roe*, Barn. 178. *Farmer*, d. *Miles*, v. *Thurstout*, Barn. 180. *Bagshaw*, d. *Ashton*, v. *Toogood*, Barn. 185. *Short*, d. *Elmes*, v. *King*, Barn. 188. *Fenn*, d. *Hildyard*, v. *Dean*, Barn. 192. *Sprightly*, d. *Collins*, v. *Dunch*, Burr. 1116. *Doe*, d. *Neale*, v. *Roe*, 2 Wils. 263. *Fenn*, d. *Buckle*, v. *Roe*, 1 N. R. 293. *Doe*, d. *Hervey*, v. *Roe*, 2 Price, 112.

day," (upon a doubt whether what had been already done was sufficient,) " the maid being at home, and opening the window, but refusing to open the door, and denying that her mistress was at home, *another copy was affixed* on the door, and the maid was told the effect of it; and *another copy was thrown in* at the window, and the original rule was *shown* to the maid."(*z*)

In a case, where it appeared in the affidavit of service, that one of the tenants was a lunatic, and that one *C.* lived with her, transacted her business, and had the sole conduct thereof, and of her person; but would not permit the deponent to have access to her, in order to serve her with the declaration, whereupon he delivered it to the said *C.*; a rule was granted, that the lunatic and *C.* should both show cause, why such service should not be sufficient; and the service on *C.* was allowed to be good.(*a*)

But where, on cause being shown against a rule for good service of a declaration in ejectment, it appeared, that the declaration was tendered on the 18th, but that the defendant's servant said, he had orders not to receive any such thing; whereupon it was not served on that day, but was left at the house upon the day following; the Court, (notwithstanding that the defendant knew of the intention to serve him,) said, " You should have left the declaration on the 18th." We sometimes by rule make that service, under particular circumstances, good, which otherwise would have been imperfect; but here there was no service on the proper day, and we cannot antedate the service; and the day was discharged.(*b*)

(*z*) *Fenn*, d. *Tyrrel*, v. *Denn*, Burr. 1181.

(*a*) *Doe*, d. *Wright*, v. *Roe*, Barn. 190.

(*b*) Wood. L. & T. 466.

Where the premises consisted of a mansion, and four small houses in a yard, surrounded by a wall, through which was a door to them, forming the only means of access, in one of which small houses resided *A.*, who was permitted to live there merely to take care of them and of the mansion-house, and the rest of the messuages were vacant: upon motion, that service on *A.* might be deemed good service under those circumstances, the Court refused the motion, and recommended the plaintiff to affix a declaration on the empty houses, and then to move that it be deemed good service.(*c*)

When the service is good for part, and bad for part, the lessor may recover those premises for which the service is good; but if he proceed for all, and obtain possession by means of a judgment against the casual ejector, the Court will compel him to make restitution of that part, for which the service was bad.(*d*)

Of the Affidavit of Service.(*e*)

When the service of the declaration is made in the regular way, the next step to be taken, in order to obtain judgment against the casual ejector, is to make an affidavit of such service; which affidavit is annexed to the declaration, and is the ground upon which the rule for judgment is to be moved for. But, when the circumstances of the case are special, it is usual to move, in the first instance, for a rule to show cause why the service mentioned in the affidavit, should not be deemed good service; and this motion may be made, either before, or after the service of the declara-

(*c*) *Ibid.* 464.
(*d*) *Ibid.* 463. Appendix, No. 41.
(*e*) Appendix, No. 16, 17, 18.

tion; although, if the lessor be aware of the difficulties he will have to encounter, it is better to make an affidavit of the circumstances, which are likely to happen, and move, prior to the service, for a rule to show cause, why a service of such a nature should not be sufficient.(*f*)

The affidavit may be sworn before a judge, or a commissioner, and should regularly be made by the person who served the declaration; although the Court have been satisfied with the affidavit of a person, who saw the declaration served upon, and heard it explained to, the tenant in possession.(*g*)

When no special circumstances take the case out of the general rule, the affidavit must state that the declaration was delivered to the tenant in possession, or his wife, &c. and that the notice, thereto annexed, was read and explained at the time of the delivery, or generally that the tenant was informed of the intent and meaning of the service.(*h*) If the affidavit only state that the notice was *read*, the service will not be sufficient,(*i*) unless the tenant afterwards acknowledge that he understands the meaning and intention of the service; but with such acknowledgment the service will be good, without any statement of the reading or explanation of the notice or service.(*j*)

If the service was upon the wife, the affidavit must also state that the service was on the premises, or at the hus-

(*f*) *Methold* v. *Norright*, W. Blk. 290. *Gulliver* v. *Wagstaff*, W. Blk. 317.

(*g*) *Goodtitle*, d. *Wanklen*, v. *Badtitle*, 2 B. & P. 120.

(*h*) Appendix, No. 16, 17, 18.

(*i*) *Doe*, d. *Whitfield*, v. *Roe*, K. B. T. T. 1815.—MS.

(*j*) *Doe*, d. *Quintin* v. *Roe*, K. B. T. T. 1816.—MS.

band's house,(*k*) or that the husband and wife were living together;(*l*) and, if the service were on the child or servant of the tenant, "that the service was afterwards acknowledged by the tenant," and also, provided the proceedings are in the King's Bench, that the tenant received the declaration, or acknowledged that he knew of the service thereof,(*m*) before the essoign day of the term.(*n*)

The affidavit must be positive, that the person, to whom the notice was addressed, was the tenant in possession, or that he acknowledged himself to be so; for no one should be evicted from possession without a positive affidavit, on which, if it be false, the person who made it may be subjected to the penalties of perjury.(*o*) An affidavit, therefore, that the deponent did serve *A. B.*, tenant in possession, *or his wife*, was held not to be sufficiently certain as to either.(*p*) So also an affidavit, that the deponent did serve the wives of *A.* and *B.*, who, or one of them, are tenants in possession, was held insufficient.(*q*)

If several persons be in possession of the disputed premises, and separate declarations in ejectment be served upon them, one affidavit of the service upon all, annexed to the copy of one declaration, is sufficient, provided one action of ejectment only be intended;(*r*) but if the ejectments are made several, so as to have separate judgments, writs of possession, &c. then separate affidavits, of the se-

(*k*) *Doe*, d. *Morland*, v. *Bayliss*, 6 T. R. 765

(*l*) *Jenny*, d. *Preston*, v. *Cutts*, 1 N. R. 308.—Appendix, No. 18.

(*m*) *Doe*, d. *Wilson*, v. Roe, K. B. T. T. 1815.—MS.

(*n*) *Roe*, d. *Hambrook*, v. *Doe*, 14 East, 441.

(*o*) *Anon.* 1 Barn. 330. *Goodtitle* v. *Davis*, 1 Barn. 429.

(*p*) *Birkbeck* v. *Hughes*, Barn. 173.

(*q*) *Harding*, d. *Baker*, v. *Greensmith*, Barn. 174.

(*r*) Appendix, No. 17.

veral services upon the different tenants, must be annexed to copies of the several declarations respectively.(*s*)

When one action only is intended, the names of *all* the the tenants are generally prefixed to each notice; but in a case where, in the several declarations served, the name of the individual tenant alone, to whom any particular declaration was delivered, was prefixed to the notice to such declaration, instead of the names of all the tenants, so that the person making the affidavit of service could not swear that a copy of any *one* declaration and notice had been served on *all* the tenants, the Court, notwithstanding, thought one rule sufficient, on motion for judgment against the casual ejector.(*t*

It often happens that an affidavit of the service of the declaration is defective; as, for example, from not stating the particular mode in which the party was served :(*u*) in such case, a supplemental affidavit should be made, and taken to the clerk of the rules, who will attend a judge thereon, and obtain an order to draw up the rule for judgment.

Of Judgment against the casual Ejector.(*v*)

The motion for judgment against the casual ejector, in ordinary cases, is *of course;* that is, such only as requires the signature of a counsel, or sergeant; and after it is signed, it must be taken by the attorney to the clerk of the rules in the King's Bench, or to the secondary of the Common Pleas; as these motions will not be received in court

(*s*) 2 Sell. Prac. 100.

(*t*) *Roe*, d. *Burlton*, v. *Roe*, 7 T. R. 477.

(*u*) *Jenny*, d. *Preston*, v. *Cutts*, 1 N. R. 308.

(*v*) *Ante*, 216.

unless there is something special in the service of the declaration: but when any special circumstances exist, the rule must be moved for as in other cases. The rule granted upon this motion is, that the judgment be entered for the plaintiff against the casual ejector by default, unless the tenant in possession appear, and plead to issue, within a certain time mentioned in the rule.(*w*)[2]

The time for moving for judgment, as also the time for the defendant's appearance, is governed by the locality of the premises, and the time mentioned in the notice, when the defendant is to appear.

In the King's Bench, if the premises are situated in London, or Middlesex, and the notice requires the tenant to appear on the first day, or within the first four days of the next term, the motion for judgment against the casual ejector should regularly be made in the beginning of that term; and then the tenant must appear within four days, inclusive, after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred until the latter end of the term, the Court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; but, if the motion be not made before the last four days of the term, the tenant need not appear, until two days before the essoign day of the subsequent term.

(*w*) Appendix, No. 20, 21, 22.

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[2] A default for the tenant's not appearing, must be entered before judgment by default can be entered against the casual ejector. *Jackson* v. *Smith*, 1 Johns. Cas. 106.

A default, for want of a plea, must be entered against the casual ejector, and not against the tenant. *Jackson* v. *Vischer*, 2 Johns. Cas. 106.

In the Common Pleas, if the premises are situated in London, or Middlesex, and the tenant has notice to appear in the beginning of the term, judgment against the casual ejector must be moved for, within one week next after the first day of every Michaelmas and Easter term, and within four days next after the first day of every Hilary and Trinity term,(*x*) except, it seems, when the tenant has absconded, and the proceedings are upon the statute of 4 Geo. II., and then the motion may be made at any time during the term; because the rule of 32 Car. II., relates only to declarations in ejectment, served upon tenants in possession.(*y*)

When the premises are situated in London or Middlesex, and the notice is to appear *generally* of the term, or being situated elsewhere, the notice is to appear in an *issuable* term, judgment must be moved for, both in the King's Bench and Common pleas, during the term in which the notice is given to appear.

When the cause of action arises elsewhere than in London or Middlesex, and the declaration is delivered, with a notice to appear in *Michaelmas* or *Easter* term, if the ejectment be brought in the Court of Common Pleas, the rule for judgment may be moved for at any time during the next *issuable* term; but if the proceedings are in the Court of King's Bench, such motion must be made during the same term in which the tenant has notice to appear. If, however, the lessor of the plaintiff neglect to make this motion during that term, the Court will grant him a rule to show

(*x*) Reg. Trin. 32 Car. II. C. B.

(*y*) *Negative*, d. *Parsons*, v. *Positive*, Barn. 172 If the principle upon which this exception is taken be correct, it seems to extend to similar cases when the proceedings are at common law.

cause at any time during the next *issuable* term ;(*z*) but if he delay to move for such rule, until within the four last days of such issuable term, he cannot make it absolute until the succeeding term.(*a*)

Notwithstanding this difference in the practice of the two courts, as to the time of moving for judgment against the casual ejector, the time for the appearance of the tenant is in both courts the same; that is to say, he has in all cases, until four days after the next issuable term, to appear and plead: and if the lands be situated in Cumberland, or in any other county, where the assizes are held but once a year, whatever may be the term in which the notice is given, the tenant is not compellable to appear until four days next after the term preceding the assizes.

By a rule of the Court of King's Bench, which has been adopted by the Court of Common Pleas,(*b*) the clerk of the rules now keeps a book, in which are entered all the rules delivered out in ejectments, instead of that formerly kept, which contained a list of the ejectments moved. The entry must specify the number of the entry, the county in which the premises lie, the name of the nominal plaintiff, the first lessor of the plaintiff, with the words "and others," if more than one, and also the name of the casual ejector. And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the term, in which the ejectment shall be moved, no rule is to be drawn up or entered, nor any proceeding had in such ejectment.

(*z*) *Doe*, d. *Pearson*, v. *Roe*, K. B. H. T. 1814. MS.

(*a*) *Goodtitle*, d. *Duke of Richmond*, v. *Badtitle*, K. B. H. T. 1814. MS.

(*b*) M. T. 31 Geo. III. 4 T. R. 1 E. T. 48 Geo. III. 1 Taunt. 317.

When the proceedings are in the King's Bench by bill, bail must be filed for the casual ejector before the judgment can be signed against him, or the Court will set the judgment aside ;(*c*) but the bail need not be filed until after the rule for judgment is drawn up.(*d*)

The reason for this form seems to be, that there is no cause in court against the casual ejector, before bail is filed ; and, therefore, nothing upon which to ground the judgment.(*e*) But where no bail was filed in ejectment, and a writ of error was brought, and it appeared by the attorney's books, that the attorney had his fee to file bail, but was since dead, the Court ordered bail to be filed *nunc pro tunc*, that no error might appear upon the record ; because, as it was on the part of the defendant to file bail, therefore he should not be allowed to take advantage of his own error ; and although the plaintiff proceeded without any bail filed by the defendant, yet as the defendant's attorney had had his fee to file such bail, and as there was no proper remedy against the defendant, because he had given the fee, nor against the attorney, because he was dead, it therefore became the justice of the court to set it right, that the plaintiff might have no mischief.(*f*)

In the time of Charles II. the Court published a rule,(*g*) that no person should be permitted to take out judgment

(*c*) *Bouchier* v. *Friend*, 2 Show. 249.

(*d*) Gilb. Eject. 21.

(*e*) It has been said, that if the tenant appear, and the cause go on to trial, the Court will not compel him (if the proceedings are *by bill*) to confess lease, entry, and ouster, unless common bail has been filed for the casual ejector; but this doctrine seems scarcely consistent with the modern principles of the remedy. Gilb. Eject. 22.

(*f*) Gilb. Eject. 22. This case seems scarcely applicable to the modern practice. (*Vide post*, Writ of Error.)

(g) Reg. Trin. 14 Car. II. and Mich. 33 Car. II.

against the casual ejector, without a certificate that a *latitat* had been taken out, and bail filed; because the Court had no authority to proceed by bill, unless the defendant appeared to be a prisoner of the court. But this certificate is not now required, nor is a *latitat* necessary; for when the casual ejector finds common bail, he admits himself to be a prisoner of the court, and whether he came into court regularly by *latitat*, or not, yet the judgment is not *coram non judice*.(*h*)

When the time appointed for the appearance of the landlord, or tenant, has expired, it is not necessary to give a rule to plead, but judgment may at once be signed against the casual ejector, provided the party interested has neglected to appear; which fact is ascertained by searching the ejectment books of the judges in the King's Bench and the prothonotary's plea book in the Common Pleas. A rule for judgment must then be drawn up with the clerk of the rules in the former, and the secondary in the latter court; and an *incipitur* of the declaration made on a proper stamp, and also on a roll of that term. These must be then taken to the clerk of the judgments in the King's Bench, and to the prothonotary in the Common Pleas, (together, when the proceedings are in the Common Pleas, with a warrant of attorney for the defendant,) and judgment will then be signed accordingly.(*i*)

The judgment, however, must not be signed, until the afternoon of the day next after that on which the rule expires; and if Sunday happen to be the last day, not until the afternoon of Tuesday.(*j*)

(*h*) Gilb. Eject. 22.
(*i*) App. No. 23.
(*j*) *Hyde*, d. *Culliford*, v. *Thrustout*, Say. 303.

After the judgment is signed, the writ of possession must be made out, (together with the præcipe for it, if in the King's Bench,) and delivered to the sheriff, who will execute the same by giving possession of the premises to the plaintiff's lessor.

Judgments against the casual ejector irregularly obtained, will, as a matter of course, be set aside ;[3] and as the situations of claimant and defendant in ejectment, are materially different, the courts are liberal in their rules for setting aside judgments against the casual ejector, although regularly signed; and will grant them even after execution executed, upon affidavit of merits, or other circumstances, which at their discretion they may deem sufficient.(*k*) The regular mode of setting aside such judgments is by rule of court, for the party having obtained the judgment to give up the possession ; but if the circumstances of the case require it, the courts will order a writ of restitution to be issued.(*l*)

(*k*) *Doe*, d. *Troughton*, v. *Roe*, Burr. 1996. *Dobbs* v. *Passer*, Stran. 975. *Mason*, d. *Kendale*, v. *Hodgson*, Barn. 250. *Doe*, d. *Grocer's Company*, v. *Roe*, 5 Taunt. 205. *Sed vide Doe*, d. *Ledger*, v. *Roe*, 3 Taunt. 506.

(*l*) *Goodright*, d. *Russell*, v. *Noright*, Barn. 178. *Davies* v. *Doe*, W. Blk. 892. Appendix, No. 41.

[3] Where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, and a writ of restitution ordered on payment of costs. *Jackson* v. *Stiles*, 4 Johns. 489. 1 Caines' Rep. 503.

The Court will go further to set aside a default in ejectment, than in any other action. *Ibid.* ; and where tenant swore, that he supposed the Supreme Court was held at the Circuit, and where a trial had been lost, default was set aside on payment of costs. *Jackson* v. *Stiles*, 3 Caines' Rep. 133.

CHAPTER IX.

OF THE APPEARANCE—PLEA—AND ISSUE.

IN the preceding chapter, the suit has been conducted to its termination, when no appearance is entered in pursuance of the notice subscribed to the declaration; we must now consider, who may appear and defend the action, and in what manner such appearance should be made.

Notwithstanding the power possessed by the courts of framing rules for the improvement of this remedy, the interference of the legislature has, at times, been called for, and it has been most beneficially exerted in regulating the appearances to the action. The tenant in possession, being the person *prima facie* interested, is, of course, the party on whom the declaration is always served; although it frequently happens in practice, that the lands belong to some third person out of possession, to whom such service can afford no information of the proceedings against him, and who, by the common law, has no remedy against his tenant, if he omit to give him notice of them. By the rules and practice of the courts, also, (for it would scarcely be correct to say by the common law,) the landlord, it seems, was not permitted to defend, even when he did receive notice, unless the tenant consented to become a co-defendant with

him ;(*m*) and no means existed by which the tenant could be compelled to appear, and be made such co-defendant.(*n*) This system occasioned great inconvenience to landlords. The tenants, from negligence or fraud, frequently omitted to appear themselves, or to give to the landlords the necessary notice : and although judgments against the casual ejector have been set aside, upon affidavits of circumstances of this nature, the remedy was still very incomplete.(*o*)

To remedy these imperfections, by the statute 11 Geo. II. c. 19. s. 13., it is enacted, " That it shall and may be lawful for the court in which an ejectment is brought, to suffer " the landlord or landlords to make him, her, or themselves " defendant or defendants, by joining with the tenant or " tenants, to whom such declaration in ejectment shall be " delivered, in case he or they shall appear; but in case " such tenant or tenants shall refuse, or neglect to appear, " judgment shall be signed against the casual ejector for " want of such appearance ; but if the landlord or land- " lords, of any part of the lands, tenements, or heredita- " ments, for which such ejectment was brought, shall de- " sire to appear by himself or themselves, and consent to " enter into the like rule that, by the course of the court, " the tenant in possession, in case he or she had appeared, " ought to have done ; then the court, where such eject- " ment shall be brought, shall and may permit such land- " lord or landlords so to do, and order a stay of execution, " upon such judgment against the casual ejector, until they " shall make further order therein."

By the 12th section of the same statute it is also enacted,

(*m*) Lill. Pr. Reg. 674.
(*n*) *Goodright* v. *Hart*, Stran. 830.
(*o*) *Anon.* 12 Mod. 211.

"That every tenant, to whom any declaration in ejectment "shall be delivered, shall forthwith give notice thereof to his "landlord, bailiff, or receiver, under the penalty of forfeit- "ing the value of three years improved, or rack-rent, of "the premises so demised or holden, in the possession of "such tenant, to the person of whom he holds, to be re- "covered by action of debt, to be brought in any of His "Majesty's courts of record at Westminster, or in the "counties palatine of Chester, Lancaster, or Durham, re- "spectively, or in the courts of grand sessions in Wales."

With respect to this latter section, it may be proper at once to observe, that it has been interpreted to extend only to those cases in which the ejectments are inconsistent with the landlord's title. Thus, a tenant of a mortgagor, who does not give him notice of an ejectment, brought by the mortgagee upon the forfeiture of the mortgage, is not within the penalties of the clause.(*p*)

The first enactment in the thirteenth section of this statute, namely, that landlords may be made defendants by joining with the tenants in possession, is decidedly only a legislative sanction of the previous uniform practice of the courts; and it is also said, by *Wilmot*, J., in the case of *Fairclaim*, d. *Fowler*, v. *Shamtitle*,(*q*) that landlords were permitted, before this statute, to defend ejectments without joining the tenants in possession. There is, indeed, but one case extant in which the contrary doctrine is maintained;(*r*) and the loose notes to be found of cases previous to that decision, certainly favour Mr. J. *Wilmot's* opinion.(*s*) It is, therefore, probable, particularly since the

(*p*) *Buckley* v. *Buckley*, 1 T. R. 647.

(*q*) Burr. 1801.

(*r*) *Goodright* v. *Hart*, Stran. 830.

(*s*) *Lamb* v. *Archer*, Comb. 208. *Anon.* 12 Mod. 211.

case above alluded to happened but a few years before the statute was passed, that the practice was not clearly settled until the time of that decision, and that the statute was enacted in consequence of the inconvenience resulting therefrom.(*t*)

By the words of the statute, the courts can admit *landlords* only to defend, instead of tenants in possession; and difficulties have frequently arisen, as to the meaning of the word *landlord* in the act, and as to what interest in the disputed premises, will be sufficient to entitle a person claiming title to appear and defend the action.

In the first reported case upon the construction of this section, it was holden, that it was not every person *claiming title*, who could be admitted to defend as landlord, but only he, who had been in *some degree in possession*, as receiving rent, &c.; and, upon this principle, the court would not allow a devisee, claiming under one will of the testator, to defend as landlord in an ejectment, brought by a devisee claiming under another will of the same testator.(*u*) But this doctrine was afterwards reprobated by Lord *Mansfield*, in a case where the principles of the section were fully considered, and the decisions, anterior to the act, investigated and explained.

"There are, (says Lord *Mansfield*,) two matters to be considered: First, whether the term '*landlord*' ought not, as to this purpose, to *extend* to *every* person whose title is connected to, and consistent with, the possession of the occupier, and devested or disturbed by any claim adverse to

(*t*) *Fairclaim*, d. *Fowler*, v. *Shamtitle*, Burr. 1290. 1298.

(*u*) *Roe*, d. *Leak*, v. *Doe*, Barn. 193.

such possession, as in the case of remainders or reversions, expectant upon particular estates; secondly, whether it does not extend, as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*, so as to prevent *either* from recovering by collusion with the occupier, without *a fair trial* with the *other*. Where a person claims in *opposition* to the title of the tenant in possession,(*v*) he can in *no* light be considered as landlord; and it would be unjust to the tenant, to make *him* a co-defendant: their defences might *clash*. Whereas, when there is a *privity* between them, their defence must be upon the *same bottom*,[4] and letting in the person behind, can only operate to prevent treachery and collusion. It is no answer, "that any person affected by the judgment may bring a new ejectment;" because there is a great difference between being *plaintiff*, or *defendant*, in ejectment.(*w*)

(*v*) *Driver*, d. *Oxendon*, v. *Lawrence*, W. Blk. 1259.

(*w*) *Fairclaim*, d. *Fowler*, v. *Shamtitle*, Burr. 1290. 1294. The principles laid down by Lord *Kenyon*, C. J., in the case of *Lovelock*, d. *Norris*, v. *Dancaster*, (3 T. R. 783.) seem to support the doctrine of Lord *Mansfield*, above mentioned; although, from the omission, in the report of the case, of the facts upon which Lord *Kenyon's* judgment was founded, the point cannot be clearly ascertained.

It was moved, that the *cestui que trust* might be made defendant in ejectment instead of the tenant, and objected to on the opposite side, because he had never been in possession, and could not be considered as a *landlord* under the statute 11 Geo. II. c. 19. s. 13.

Lord *Kenyon*, C. J., "If the person requiring to be made a defendant under the act had stood in the situation of immediate heir to the person last seised, or had been in the relation of remainderman, under the same title as the original landlord, I am of opinion that he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself is, whether he is entitled to be landlord or not; and, therefore, we are not authorized to extend the provision of the statute to such a case as this." The rule was discharged.

[4] A party will not be admitted to defend, unless he swear there is a pri-

The judgment in this case was not, indeed, ultimately given upon these points; but the principle upon which the statute is to be interpreted, seems to have been established by it; and we may now consider, that the word *landlord* is extended to all persons claiming title, consistent with the possession of the occupier; and that it is not necessary they should previously have exercised any act of ownership over the lands. Thus, the courts have permitted an heir, who had never been in possession, to defend an ejectment, where the father, under whom he claimed, had died just before, having previously obtained the same rule.(*x*) So a devisee in trust, not having been in possession, was permitted to defend an ejectment,(*y*) and a mortgagee has been made defendant with the mortgagor.(*z*)

If a party should be admitted to defend as landlord, whose

(*x*) *Doe*, d. *Hebblethwaite*, v. *Roe*, cited 3 T. R. 783.

(*y*) *Lovelock*, d. *Norris*, v. *Dancaster*, 4 T. R. 122.

(*z*) *Doe*, d. *Tilyard*, v. *Cooper*, 8 T. R. 645. It does not appear, from the report of this case, whether the mortgagee had previously received any rent; but, from the principles above, laid down, the circumstances seem immaterial. (*Sed vide* B. N. P. 95.)

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vity between him and the tenant in possession. *Jackson* v. *M'Evoy*, 1 Caines' Rep. 151. *Jackson* v. *Stiles*, 10 Johns. 67.

A person may be admitted to defend as landlord, between whom and the defendant a privity of interest exists, although he does not receive rents, which is not the true test. Coleman's Cas. Prac. 56.

The assignee of a mortgage may be let in to defend as landlord, but he must stipulate to give no evidence of any title except that acquired under the mortgage. *Jackson* v. *Babcock*, 17 Johns. 112.

Where a person had been discharged under the insolvent act, it was held that he had no further right in the premises, and could not be let in to defend as landlord. *Jackson* v. *Stiles*, 10 Johns. 67, 69.

Where landlord is admitted to defend, plaintiff can only recover such premises as he proves to be in possession of the tenant. *Fenn* v. *Wood*, 1 Bos. & Pul. 573.

title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the court, or to a judge at chambers, and have the rule discharged with costs.(*a*) If, however, he neglect to do so, and the party continue upon the record as defendant, such party will not be allowed to set up such inconsistent title as a defence at the trial.(*b*)

The Court of King's Bench, in a case which has already been frequently cited, exercised a singular species of equitable jurisdiction, with respect to the admission of a person claiming title to defend an ejectment. The action was brought by one, claiming as the heir of a copyholder; and the lord of the manor, claiming by escheat *pro defectu hæredis*, obtained a rule to show cause why he should not be admitted defendant. After considerable argument as to the legality of the lord's claim to defend, it was agreed by both parties, at the recommendation of the court, that the then ejectment should be discontinued, and a fresh one brought in the lord's name, in which the heir should be admitted defendant; and Lord *Mansfield*, C. J., declared afterwards, that if the heir had refused to consent to this arrangement, they would have admitted the lord to defend, and that if the lord had refused his consent, they would have discharged the rule.(*c*)

A wife has been permitted to defend an ejectment, where the title of the plaintiff's lessor arose from a pretended intermarriage with her, which marriage she disputed.(*d*)

(*a*) *Doe*, d. *Harwood*, v. *Lippencott*.—*Coram Wood*, B. Trin. Vac. 1817. MS.

(*b*) *Doe*, d. *Knight*, v. *Lady Smythe*, 4 M. & S. 347.

(*c*) *Fairclaim*, d. *Fowler*, v. *Shamtitle*, Burr. 1290.

(*d*) *Fenwick* v. *Gravenor*, 7 Mod. 71.

But a parson claiming a right to enter, and perform divine service, has been held not to have a sufficient title to be admitted defendant;(*e*) and, where the application for admission appeared only a device to put off the trial, the Court refused to grant a rule.(*f*)

It may be useful to observe, that it is not necessary for the landlord to be made defendant, in order to make his title admissible in evidence; but that he may, with the tenant's consent, defend the ejectment in the tenant's name. And where a suit was so defended, and the lessor of the plaintiff, having knowledge thereof, obtained from the tenants a *retraxit* of the plea, and a *cognovit* of the action, the Court directed the judgment to be set aside.(*g*)

Thus far as to who may appear: we must now consider how the appearance should be made, and herein first of the Consent Rule.

The form(*h*) and purposes of the consent rule have already been cursorily mentioned;(*i*) but they must now be spoken of more fully. It is in substance as follows: First, The person appearing consents to be made defendant instead of the casual ejector. Secondly, To appear at the suit of the plaintiff; and, if the proceedings are by bill, to file common bail. Thirdly, To receive a declaration in ejectment,(*j*) and plead not guilty. Fourthly, At the trial of the issue to confess lease, entry, and ouster, and insist

(*e*) *Martin* v. *Davis*, Stran. 914. *Vid. cont. Hillingsworth* v. *Brewster*, Salk. 256.

(*f*) *Fenwick's* case, Salk. 257.

(*g*) *Doe*, d. *Locke*, v. *Franklin*, 7 Taunt. 9.

(*h*) Appendix, No. 25.

(*i*) *Ante*, 13.

(*j*) The declaration, served upon the tenant to bring him into court, is the only declaration now delivered.

upon title only. Fifthly, That if at the trial the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the costs of the *non pros*, and suffer judgment to be entered against the casual ejector. Sixthly, That if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant. Seventhly, When the landlord appears alone, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution be stayed until the Court shall further order.(*k*)

A trifling variation, with respect to the manner of describing the premises, exists in form between the consent rule of the Court of King's Bench, and of the Court of Common Pleas. The defendant, in the former court, consenting to confess lease, entry, and ouster, generally of all the premises mentioned in the declaration; but, in the latter, of so much of them only as are in his own, or his under-tenant's possession. The consent rules are, however, now considered as essentially the same in both courts; and it is in all cases necessary for the plaintiff's lessor to give evidence at the trial, of the possession of the defendant, or his under-tenants, of the premises in dispute, at the time of the commencement of the action.(*l*)

Formerly the consent rule was drawn up in both courts, according to the present practice in the Common Pleas, or it specially described the premises defended, at the discre-

(*k*) Sel. N. P. 644.

(*l*) *Goodright*, d. *Balsh*, v. *Rich*, 7 T. R. 327.

tion of the defendant. Evidence of the possession of the tenant was then held necessary in the former case, but not in the latter; and so different were the principles upon which the courts then acted in regard to this action, from those by which they are now governed, that, by a rule of the court of King's Bench, in the time of Charles II.,(*m*) the defendant, in case the consent rule were drawn up generally, was obliged to give to the lessor of the plaintiff notice in writing of the particular premises for which he meant to defend, in order to release the lessor from the proof of the defendant's possession. This practice was, indeed, soon discontinued, and it became customary in lieu thereof, to insert in the margin of the consent rule, the particular premises for which the defendant appeared, which was then supposed to supersede the necessity of any proof of possession; but this marginal insertion has also now degenerated into a mere form, and since the cases of *Goodright*, d. *Balsh*, v. *Rich*, in the King's Bench,(*n*) and *Fenn*, d. *Blanchard*, v. *Wood*, in the Common Pleas,(*o*) by which cases it has been decided in both courts upon principles the most correct, that evidence must in all cases be given of the possession of the defendant, or such of his under-tenants as have declarations in ejectment served upon them, the distinctions between appearing for part, or appearing for the whole, or generally, or specially, describing the premises in the consent rule, no longer prevail.

The general consent rule will, in all cases, be sufficient to prevent a nonsuit for want of a real lease, entry, and ouster, except when it is necessary that an actual entry(*p*) should be made upon the land previously to the commence-

(*m*) Trin. Term, 15 Car. II.
(*n*) 7 T. R. 327.
(*o*) 1 B. & P. 573.
(*p*) *Ante*, chap. 4.

ment of the suit. When, therefore an ejectment is brought by a joint tenant, parcener, or tenant in common, against his companion, (to support which an *actual ouster*(*q*) is necessary,) the defendant ought to apply to the court upon affidavit,(*r*) for leave to enter into a special rule, requiring him to confess lease and entry at the trial, but not ouster also, unless an actual ouster of the plaintiff's lessor by him, the defendant, should be proved;[5] and this special rule will always be granted,(*s*) unless it appear that the claimant has been actually obstructed in his occupation.(*t*)

As the consent rule contains conditions to be observed on the part of the claimant, as well as of the tenant, the claimant is obliged to join in it: and an attachment will lie against either party for disobedience of this, as of every other rule of court.

It may here be observed, that when several tenants are in possession, to whom the claimant delivers declarations for different premises, the Court will not join them in one action, on the motion of either party, although the claimant has but one title to all the lands; for, if the motion be made on the part of the plaintiff, the Court will object, that each defendant must have a remedy for his costs, which he could not have if all were joined in one declaration, and the plaintiff prevailed only against one of them; and if it be made on the part of the defendants, that the lessor might

(*q*) *Ante*, 56.
(*r*) Appendix, No. 26.
(*s*) Appendix, No. 27, 28.
(*t*) *Anon.* 7 Mod. 39. *Oates*, d. *Wigfall*, v. *Brydon*, Burr. 1895—*Doe*, d. *Ginger*, v. *Roe*, 2 Taunt 397.

[5] A defendant claiming as tenant in common, must enter into this special consent rule, otherwise he cannot allege no actual ouster as a defence. *Jackson* v. *Denniston*, 4 Johns. 312.

have sued them at different times, and it would be obliging him to go on against all, when perhaps he might be ready against some of them only.(*u*) But where several ejectments are brought for the *same premises*, upon the *same demise*, the Court, on motion, or a judge at his chambers, will order them to be consolidated ;(*v*) and although, where the premises are different, the Court will not consolidate the actions, yet, in a modern case, where, on a rule to show cause why the proceedings in all the causes (which were thirty-seven in number, and brought against the several inhabitants of the houses in Sackville-street) should not be stayed, and abide the event of a special verdict in one of them, as they all depended upon the same title, Lord *Kenyon*, C. J. said, it was a scandalous proceeding on the part of the claimant; and the rule was made absolute.(*w*)

When the tenant intends to apply to be made defendant, his attorney must procure a blank form of a consent rule, and entitle it in the margin with the names of the plaintiff and casual ejector, inserting also therein, the premises as described in the declaration, or such part of them as he would wish to defend, and stating in the body the consent of both parties, that the tenant be made defendant. He must then sign his name to this paper, which is called the agreement for the consent rule,(*x*) and leave the same at one of the judge's chambers, when the proceedings are in the King's Bench, or with the prothonotary when in the Common Pleas, (where it will also receive the signature of the attorney of the lessor of the plaintiff,) together with a plea of the general issue. Common bail is then entered

(*u*) *Medlicot* v. *Brewster*, 2 Keb. 524. *Smith* v. *Crabb*, Stran. 1149.

(*v*) *Grimstone*, d. Lord *Bowers*, v. *Burghers*, Barn. 176. *Roe*, d. *Burlton*, v. *Roe*, 7 T. R. 477.

(*w*) 2 Sell. Prac. 144.

(*x*) Appendix, No. 24.

for the tenant, if the proceedings are by bill, or the usual appearance, if by original; and the suit proceeds in his name, instead of that of the casual ejector.(*y*)

When the landlord and tenant appear jointly, or the landlord appears alone, the same forms are observed, *mutatis mutandis*, together with the addition of counsel's signature to a motion (which is motion of course, and must be annexed to the consent rule) to admit the landlord and tenant, or landlord only, to defend: accompanied also, when the landlord appears alone, with an affidavit of the tenant's refusal to appear.(*z*)

When the party who wishes to be made defendant is not the tenant, or *actual* landlord, but *has some interest to sustain*, the Court must be moved, on an affidavit of the facts, to permit him to defend with or without the tenant, as the case may require.

If the tenant refuse to appear, the landlord cannot appear in his name, nor appoint an attorney to do so for him, and an irregular appearance of this sort will be ordered to be withdrawn.(*a*)

When it happens that the lessor of the plaintiff claims lands in the possession of different persons, and one of the tenants would be a material witness for the others, such tenant should suffer judgment to go by default, as to the part in his possession; because, if he appear, and be made a defendant, he becomes a party to the suit, and conse-

(*y*) 2 Sell. Prac. 102.

(*z*) *Hobson*, d. *Bigland*, v. *Dobson*, Barn. 179. 2 Sell. Prac. 102.—Appendix, No. 29.

(*a*) *Roe*, d. *Cook*, v. *Doe*, Barn. 39. 178.

quently cannot be a witness therein; and it seems, that if he appear and plead, the Court will not afterwards strike out his name upon motion.(*b*)

When the landlord is admitted to defend without the tenant, judgment must be signed against the casual ejector, according to the conditions of the consent rule. The reason for this practice is, to enable the claimant to obtain possession of the premises, in case the verdict be in his favour; because, as the landlord is not in possession, no writ of possession could issue upon a judgment against him.

The motion to admit the landlord to be defendant, instead of the tenant, ought regularly to be made before judgment is signed against the casual ejector, by the opposite party; and if it be delayed until after that time, the Court will grant the motion or not, at their discretion.(*c*)[6] Thus, where a judgment against the casual ejector was signed, and a writ of possession executed thereon, and it appeared, upon motion, that the landlord's delay in his application arose from the tenant's negligence, in not giving him due notice of the service of the declaration, according to the provisions of statute 11 Geo. II. c. 19. s. 12., the Court ordered the judgment and execution to be set aside, compelled the tenant to pay all the costs, and permitted the landlord to be made defendant on the usual terms; notwithstanding it was strongly argued by the opposite

(*b*) B. N. P. 98.

(*c*) *Dobbs* v. *Passer*, Stran. 975.

[6] After judgment by default against the casual ejector, the landlord may be let in to defend. *Jackson* v. *Stiles*, 4 Johns. 493.

In such case, the judgment against the casual ejector remains, with stay of execution, till the further order of the court. *Ibid.* 495. 1 Rev. Laws, 443, 444.

party, that the judgment was perfectly regular, and that the tenant's negligence was entirely a matter between him and his landlord, for which the statute had given the landlord ample compensation.(*d*) But in a recent case, the Court of Common Pleas, after a recovery in an undefended ejectment, without collusion, and after the lessor of the plaintiff had contracted for the sale of part of the premises, and let the purchaser into possession refused to set aside the judgment, and writ of possession upon an application of this nature, and assigned as their reason, that the concealment of the delivery of the declaration was a matter between the tenant and his landlord, with which the plaintiff's lessor had no concern.(*e*) And, in another case, where the landlord applied to be made defendant, after judgment had been signed, but before execution, and the claimant offered to waive his judgment, if the landlord, who resided in Jamaica, would give security for the costs, to which offer the landlord's counsel would not accede, the Court refused the application, and permitted the plaintiff's lessor to take out execution.(*f*)

The appearance should, in all cases, be entered of the term mentioned in the notice, unless it be a country cause, and the notice be to appear in a *non-issuable* term, and then the appearance must be of the next *issuable* term; and where the notice was to appear in Hilary term, and the tenant entered an appearance in Michaelmas term, and did nothing farther, and the plaintiff's lessor, finding no appearance of Hilary term, signed judgment against the casual ejector, the Court held the judgment regular, but

(*d*) *Doe*, d. *Troughton*, v. *Roe*, Burr. 1996

(*e*) *Goodtitle* v. *Badtitle*, 4 Taunt. 820.

(*f*) *Roe*, d. *Hyde*, v. *Doe*, Barn. 186.

afterwards set it aside upon payment of costs, to try the merits.(*g*)

The party, intending to defend the action, having appeared according to the forms above mentioned, the lessor's duty in consequence thereof, must be our next consideration.

When the time for appearance has expired, the lessor's attorney must search at the proper offices for the agreement before mentioned on the part of the defendant, to enter into the consent rule; and, having signed his name on it, above that of the defendant's attorney, and also (when the proceedings are in the King's Bench) obtained the signature of the judge, at whose chambers the agreement was left, he must take it to the clerk of the rules, or secondary, who will file it, and draw up the consent rule thereupon:(*h*) which consent rule is, in truth, a copy of the agreement, prefixing only the date of drawing it up, omitting the premises in the margin, and adding "by the Court," instead of the attornies' names, at the end.

The plea of the general issue, we have before observed, is generally left by the defendant with the agreement for the consent rule;[7] and, when this is the case, as soon as the consent rule is drawn out, the issue is at once made up, with a copy of the rule annexed, and delivered to the defendant's attorney, with notice of trial as in other actions.

(*g*) *Mason*, d. *Kendall*, v. *Hodgson*, Barn. 250.

(*h*) Appendix, No. 25.

[7] The delivering a new declaration, putting in common bail, and filing a plea, are acts simultaneous with the entering into the consent rule. *Jackson* v. *Woodward*, 2 Johns. Cas. 110.

But if the plea be not left with the consent rule,(*i*) the plaintiff must give a rule to plead, and then judgment may be entered for want of a plea, as in other actions without a special motion in court for the purpose.(*j*)[8]

Of the Plea, and Issue.

The general issue in this action is, *not guilty*;(*k*) and it seldom happens, by reason of the consent rule, that the defendant can plead any other plea. It is not, indeed, easy to imagine a case in which any other plea in bar can be necessary; for as the claimant must, in the first instance, prove his right to the possession, whatever operates as a bar to that right, as a fine with non-claim, the statute of limitations, a descent cast, &c. must cause him to fail in proving his possessory title, and consequently entitle the defendant to a verdict upon the general issue.(*l*) As, however, the consent rule was introduced for the purposes of

(*i*) Where the plea was entitled with the true name of the cause, but, by mistake in the body of the plea, the name of the lessor was inserted as the person complaining, instead of that of the plaintiff, and the lessor's attorney, looking upon this plea as null and void, signed judgment against the casual ejector; the judgment was set aside, with costs, as irregular, for the plea was properly entitled, and not a nullity. *Goodtitle* v. *Badtitle*, Barn. 191.

(*j*) Reg. Hil 1649, and Trin. 18 Car. II. B. R.

(*k*) Appendix, No. 30.

(*l*) In the time of Lord *Coke*, (*Peytoe's* case, 9 Co 77.,) an accord with satisfaction was held to be a good plea in ejectment, "because an ejectment is an action of trespass in its nature, and in trespass accord is a good plea;" but as this plea is quite inapplicable to the modern uses of the action, the Court, it is conceived, would not at this time allow a defendant to plead it.

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[8] And where tenant had entered into consent rule, but does not file his plea, he is considered as not having appeared, and default must be taken against casual ejector. *Jackson* v. *Vischer*, 2 Johns. Cas. 106. *Jackson* v. *Woodward*, 2 Johns. Cas. 110.

justice, the courts would undoubtedly permit the defendant to plead specially, if the particular circumstances of the case should require it.(*m*)

A plea to the jurisdiction may be pleaded in ejectment by permission of the Court, but not otherwise. This permission is necessary, because a plea to the jurisdiction is a plea in abatement, and must, therefore, be pleaded within the four first days of the term next ensuing that of which the declaration is entitled, at which time the casual ejector, and not the tenant, is defendant. To obtain leave to plead such plea, the Court must be moved upon affidavit before the expiration of the four first days of term, the plea itself being first filed; and the motion should be for a rule to show cause why the defendant should not be permitted to plead the facts stated in the affidavit, and why the plea then filed to that effect should not be allowed. The latter part of the rule, and the filing of the plea, are necessary parts of the application; because the four days would, in all probability, expire before cause could be shown and the plea pleaded, unless such plea were pleaded *be bene esse* in the first instance.(*n*)

Such, at least, has been the mode of proceeding in the only two reported cases upon the subject, which can be cited as authorities. But a practical difficulty occurs, for which these cases seem not to provide. At the time when the application for leave to plead to the jurisdiction is made, the tenant has not appeared, and the proceedings are against the casual ejector. By whom then should the plea be pleaded, and how is the tenant to appear? The most simple

(*m*) *Philips* v. *Bury*, Carth. 180. W. Blk. 197. *Doe*, d. *Morton*, v. *Roe*,
(*n*) *Williams*, d. *Johnson*, v. *Keen*, 10 East, 523.

method of avoiding these difficulties is for the tenant, in the first instance, to file the plea in his own name, and then move for a rule to show cause "why he should not be forthwith admitted defendant upon the usual terms, except as far as relates to pleading the general issue, and why he should not be permitted to plead the facts stated in the affidavit, upon which he moves, in lieu thereof, and why the plea already filed by him to that effect should not be allowed."

Ancient demesne is a good plea in ejectment;(*o*) but it is a plea much discouraged, and the person pleading it must carefully observe every form which the Court deems necessary. As it is a plea in abatement, application for leave to plead it must, as has already been stated, be made within the four first days of term; and the application must be accompanied by an affidavit, that the lands are holden of a manor which is ancient demesne, that there is a Court of ancient demesne regularly holden, and that the claimant has a freehold interest; and the court will refuse the motion if any of these facts be omitted in the affidavit.(*p*)

Ancient demesne cannot of course be pleaded where the ejectment is brought for copyhold lands;(*q*) but if the affidavit state that the lands are ancient demesne, the court will not reject the plea upon a counter affidavit that great part of the lands are copyhold, but will leave the plaintiff to state such matter in his reply.(*r*)

When the party appearing has entered into the consent

(*o*) Appendix, No. 31, 32.

(*p*) *Doe*, d. *Rust*, v. *Roe*, Burr. 1046. *Denn*, d. *Wroot*, v. *Fenn*, 8 T. R. 474.

(*q*) *Brittle* v. *Dade*, Salk. 185. S. C. Ld. Raym. 43.

(*r*) *Doe*, d. *Morton*, v. *Roe*, 10 East, 523.

rule and pleaded, he may move for a rule to reply, before the plaintiff's lessor has joined in the consent rule, and the plaintiff may be *non-prossed* thereby; but as the plaintiff is only a fictitious person, the defendant will not be entitled to costs.(*s*)[9]

The issue must agree with the declaration against the casual ejector in all respects, except in the defendant's name, unless an order for the alteration be obtained; and if there be a difference between the issue and the declaration, the Court on motion will set it right.(*t*)

If the party interested appear and plead, and after having pleaded withdraw his plea, the judgment must be entered against the party so appearing.

The record and issue are made up with memorandums, if the proceedings are by bill; and without any memorandum, if by original, as in other actions: the time allowed for notice of trial is also the same.

A plea *puis darrien continuance* it seems may be pleaded to this action; but where the plea was, that after issue joined, one of the lessors of the plaintiff had released to the de-

(*s*) *Goodright*, d. *Ward*, v. *Badtille*, W. Blk. 763.

(*t*) *Bass* v. *Bradford*, Ld. Raym. 1411.

[9] The death of a lessor in ejectment does not abate the suit, and so far has this doctrine been carried, that even where lessor was tenant for life, his death was not permitted to abate the suit, which, it was held, might still be prosecuted to enable the plaintiff to recover the mesne profits and his costs, but with a perpetual stay of the writ of possession. *Jackson* v. *Davenport*, 18 Johns 295. *Frier* v. *Jackson*, 8 Johns. 507.

But in such cases Court will oblige the plaintiff to find security for costs. 2 Str. 1056. 1 Bac. Abr. 13. Jenk. 293. pl. 38.

fendant, the Court held the plea insufficient, and said the release ought to have been by the nominal plaintiff; because, although in every other respect the Court would look upon the lessor as the interested person, as far as the record was concerned they must consider the nominal plaintiff as the real party.(*u*)[1][2] A release by the nominal plaintiff so pleaded, would certainly, when the old practice prevailed, have been a good defence to the action; but even then the Courts held such a release to be a contempt,(*v*) and it is very doubtful whether a judge would receive the plea at the present day.

When the ancient practice prevailed, if the plaintiff in ejectment after issue joined, and before the trial, entered into any part of the premises, the defendant at the assizes might plead such entry as a plea *puis darrien continuance*. But this plea cannot now be ever necessary; for the plaintiff, being a fictitious person, cannot enter upon the land; and if the lessor of the plaintiff should enter, he would be unable at the trial to prove the possession of the defendant, and must consequently fail in his ejectment.(*w*)

(*u*) *Doe*, d. *Byne*, v. *Brewer*, 4 M. & S. 300.

(*v*) *Ante*, 181.

(*w*) *Moore* v. *Hawkins*, Yelv. 180.

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[1] The plaintiff in ejectment cannot recover under a demise from a lessor who has released his interest to the defendant, but is stopped by such release to claim any title. *Jackson* v. *Foster*, 12 Johns. 488. *Jackson* v. *Wheeler*, 10 Johns. 164.

[2] In ejectment, where matter of defence arose after issue joined, it was determined that it must be taken advantage of by a plea, *puis darrien continuance*. *Jackson* v. *Rich*, 7 Johns. 195.

As where defendant, since issue joined, surrendered the premises to the lessor. *Ibid.*

Accord and satisfaction is a good plea in ejectment, for ejectment supposes a trespass, and they are so interwoven that they cannot be severed. *Peyloe's* case, 9 Co. 77 *b*.

CHAPTER X.

OF THE EVIDENCE IN THE ACTION OF EJECTMENT.

THE facts necessary to be established by a claimant in ejectment, when his title to the premises is controverted, are as follows. First, he must prove that he had *the legal* estate in the disputed lands at the time of the demise laid in the declaration; secondly, that such legal estate was accompanied by *a right of entry;* and, thirdly, that the defendant, or those claiming under him, were in possession of the premises at the time when the declaration in ejectment was delivered. When, indeed, there is a privity between the parties, as if the relationship of landlord and tenant has subsisted between them, proof of title will be unnecessary; for a party will not be allowed to dispute the original right of him by whom he has been admitted into possession,(*x*) although he is at liberty to show that such right has expired.(*y*) In cases of this nature, therefore, it will be sufficient to prove, that the defendant, or those under whom he claims, (for the rule extends to under-tenants,(*z*)) were ad-

(*x*) *Driver* v. *Laurence*, W. Black. 1259. 4 T. R. 682. Vide *Baker* v. *Mellish*, 10 Vez. Jun 544.

(*y*) *England*, d. *Syburn*, v. *Slade*,

(*z*) *Barwick*, d. *Mayor of Richmond*, v. *Thompson*, 7 T. R. 488.

mitted into possession of the premises in question, by the lessor of the plaintiff, and that their right to the possession has ceased. And upon the same principle, if the defendant has held as tenant to some third person under whom the lessor claims, although the derivative title of the claimant from such third person must be proved in addition to the evidence necessary in the last case, proof of the title of the third person himself will not be required.

The identity of the lands, and the possession of them by the defendant, can always be proved without difficulty, when a privity exists between the parties, by the fact of payment of rent, or by the acknowledgment of the defendant that he is tenant, &c. When there is no privity, the general mode of proof is by reading the deeds or wills under which the lessor claims, and showing that the names and abutments of lands in the defendant's possession, agree with the premises described therein; or by showing that the lands in dispute were formerly in possession of the ancestors, &c. of the claimant; and the declarations of deceased tenants may be received in evidence, for the purpose of proving that any particular lands formed part of the estate they occupied.(*a*) Cases in which it is extremely difficult to prove identity and possession will, indeed, sometimes occur, from the deficiency of the description in the title deeds, the length of time during which the claim has lain dormant, or other causes: but these cases all depend upon their own circumstances, and it is impossible to give any general directions concerning them.

The evidence necessary to establish the other parts of

(*a*) *Davies* v. *Pierce*, 2 T. R. 53. *Et vide Ivat* v. *Finch*, 1 Taunt. 141. *Outram* v. *Morewood*, 5 T. R. 121.

the lessor's case will of course vary according to the nature of his claim. We shall, therefore, first consider the several proofs requisite in support of each particular title, when no privity exists between the parties: and, secondly, the proofs required when such privity does exist.[3]

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[3] It may be well here to state how far parol declarations have been determined to be admissible in ejectment. The declarations or confessions of a party, when against himself, may be given in evidence in ejectment, as to facts which rest in parol, and are *dehors* the title itself; or facts relating to the time or manner of holding possession, the boundaries or location of the premises in question, the delivery or loss of a deed, or that the same had been ante-dated. In the case of *Waring* v. *Warren*, 1 Johns. 343. it was determined, that the declarations of a party holding adversely could not be given in evidence to support his own possession, though they might be received when against it. And in *Jackson* v. *Bard*, 4 Johns. 230. evidence of the declarations of a party in possession was held admissible against him, and all claiming under him, which declarations related principally to the ante-dating of a deed. And in *Jackson* v. *M'Call*, 10 Johns. 377. parol confessions of a person in possession, as to the true boundary line, were held admissible.

But the acknowledgments or confessions of a party, relating to the title itself, are inadmissible In the case of *Jackson* v. *Sherman*, 6 Johns. 19, 21. it is said by the Court, that "the acknowledgments of a party as to title to real estate, are a dangerous species of evidence, and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title. This would be to counteract the beneficial purposes of the statute of frauds." And in the case of *Jackson* v. *Cary*, 16 Johns. 302, 306. *Spencer*, J says, "Although parol declarations of a tenancy have been received with certain qualifications, parol declarations of a person having title to lands are inadmissible to defeat the title, it being contrary to the statute of frauds and perjuries, which is the *magna charta* of real property." And, on the same principle, parol evidence of a disclaimer of title to real property is inadmissible. *Jackson* v. *Vosburgh*, 7 Johns. 186. *Jackson* v. *Kisselbrach*, 10 Johns. 338. 4 Cruise's Dig. 367. *Brant* v. *Livermore*, 10 Johns. 358.

So, it has been ruled by the Supreme Court of Pennsylvania, in *Lessee of Watson* v *Bailey*, (1 Binney's Penn. Rep. 470.) that parol declarations of the wife cannot be received to supply a defective acknowledgment.

And in Massachusetts it was held, that the declarations of one of several devisees, that a testator was not of sound mind, were inadmissible to show his insanity. *Phelps* v. *Hartwell*, 1 Mass. Rep. 71. The declarations of a grantee cannot be admitted to show that the land included in a conveyance, was not so intended by the parties. *Paine* v. *M'Intire*, 1 Mass. Rep. 69.

Before, however, we proceed in this inquiry, it will be useful to give a short account of the decisions respecting the competency of parties, having an interest in the lands, to give testimony concerning them.

The tenant in possession is not a competent witness to support his landlord's title, inasmuch as he is interested in the event of the suit;[4] for if the verdict be against his landlord he is liable for the mesne profits, and may also be turned out of possession :(*b*) nor is his evidence admissible to prove that he, and not the defendant, is really the tenant;[5] for a verdict against such defendant would have the effect of ejecting him (the witness) from the lands, which is an immediate interest, and outweighs the contrary and remoter effect of subjecting himself, by his testimony, to a future action.(*c*)[6] Upon the principle of interest, also, the person having the inheritance of the lands is not an admissible witness, where two persons, both of whom admit his title, are contending for the possession under different grants from him, (unless, indeed, they claim under grants not rendering rent,) for he is interested, inasmuch as

(*b*) *Doe*, d. *Forster*, v. *Williams*, (*c*) *Doe*, d. *Jones*, v. *Wilde*, 5 Cowp. 621. *Bourne* v. *Turner*, Stran. Taunt. 183. 632.

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[4] A lessor of the plaintiff cannot be a witness in the cause. *Jackson* v. *Ogden*, 4 Johns. 140.

[5] The same point is decided by the Supreme Court of New-York, in *Brant* v. *Dyckman*, 1 Johns. Cas. 275. and in *Jackson* v. *Truesdell*, 12 Johns. 246.

[6] A person who was a tenant under a *devisee*, of part of the estate devised, was held to be a competent witness in an action of ejectment brought by the heir against a tenant, who held part of the premises under the testator or devisee, and part under the witness, in order to impeach the validity of the will. *Jackson* v. *Rumsey*, 3 Johns. Cas. 234.

he may prefer one tenant to another.(*d*)[7] In like manner, a person who has mortgaged lands cannot be an evidence

(*d*) *Fox* v. *Swann*, Styl. 482. *Bell* v. *Harwood*, 3 T. R. 308.

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[7] The tenant is a competent witness when testifying against his interest. *Jackson* v. *Vredenbrugh*, 1 Johns. Rep. 157.

A feme covert, who had executed a deed with her husband, is a competent witness to prove that the deed was antedated; for, if antedated, an acknowledgment made by her, at any time, would bar her right to dower, and if not acknowledged her signing was no bar. *Jackson* v. *Bard*, 4 Johns. 230.

A person having a right of dower in the premises in dispute, is a competent witness, for the recovery in ejectment cannot be given in evidence against her. *Jackson* v. *Vandusen*, 5 Johns. 144.

The declarations of a party to an instrument, who may be considered as interested at the time to declare in the particular manner testified to, can in no case be admitted as evidence for any purpose. *Clarke* v. *Waite*, 12 Mass. Rep. 439.

So the declarations of a grantor are inadmissible, even after the death of the grantor, and all the subscribing witnesses. *Bartlet* v. *Delprat*, 4 Mass. Rep. 702.

Evidence of the declarations of one who has given a deed with warranty, cannot be received to support a title deduced from such person, for the testimony of the person himself to that point would be inadmissible, but the declarations may be received to show in what character such person entered. *Jackson* v. *Vredenbrugh*, 1 Johns. 159.

A. gave a deed with warranty to B., and afterwards, by another deed with warranty, conveyed land adjoining to C. In an action in which the question was, whether the bounds of the land granted to B. did not extend so as to include the premises granted to C. A. was held not a competent witness as to the boundaries, for he is interested to support C.'s title. *Jackson* v. *Hallenbach*, 2 Johns. 394.

But had he been equally liable to either, in case either had recovered, then he would have been competent. *Ilderton* v. *Atkinson*, 7 T. R. 480.

Where A. conveys to B. with warranty, and B. conveys to C. with warranty, A. is a good witness for C. on being released by C., for the release prevents C. from resorting either to A. or B. *Jackson* v. *Root*, 18 Johns. 60.

A grantor in a deed which is impeached as fraudulent, on being released by the grantee, is competent to prove, as well as to disprove, the fraud, the objection going only to his credit. *Jackson* v. *Frost*, 6 Johns. 135.

The Supreme Court of Massachusetts has decided, that a party to a deed of land, who is not interested, is competent to prove the deed fraudulent or void. *Hill* v. *Payson*, 3 Mass. Rep. 559. and *Leker* v. *Haynes*, 11 Mass. Rep. 498.

concerning them; for the equity of redemption still remains in him.(*e*) An heir apparent may, however, be a witness concerning the title of the land, because his heirship is a mere contingency;[8] but a remainderman cannot, for he hath a present estate in the land; and this rule extends to the remainderman in tail.(*f*)

Let us now consider the proofs to be adduced by a claimant in ejectment, when his title to the lands can be controverted.

When the party claims as heir at law, he must prove that the ancestor from whom he derives his title, was the person last seised of the actual freehold and inheritance; that is to say, who was last actually in possession of the lands in fee-simple,(*g*) and that he, the claimant, is his heir.

This seisin of the ancestor may be proved in the first instance, by showing that he was either in the actual possession of the premises, at the time of his death, or in

(*e*) *Anon.* 11 Mod. 354.
(*f*) *Smith* v. *Blackham*, Salk. 283.
(*g*) Co. Litt. 11. *b.* *Jenkins*, d. *Harris*, v. *Pritchard*, 2 Wils. 45.

But that a person, who has undertaken to convey a title to land, is incompetent to testify that he had no title. *Storer* v. *Batson*, 8 Mass. Rep. 431.

The Supreme Court of Pennsylvania say, in *Lessee of Cain* v. *Henderson*, (2 Bin. Penn. Rep. 108.) that the grantor of a tract of land, who has not given any warranty, nor practised any deception, is a competent witness to support the title. And they also say, in *M'Ferran* v. *Powers*, (1 Serjeant & Rawle, 102.) that the rule, that no man shall be permitted to impeach his own deed, applies only to negotiable instruments; and a grantor in a deed without warranty is a good witness to invalidate it.

[8] A remote, or contingent interest, goes only to the credit, and not to the competency of a witness. *Stewart* v. *Kip*, 5 Johns. 256.

the receipt of rent from the ter-tenant; for possession is presumptive evidence of a seisin in fee, until the contrary be shown.(*h*)[9] If, however, it is probable that the defendant may be able to rebut this presumption, the lessor should be prepared with other proofs of his ancestor's title.

In order to show the heirship of the claimant, he must prove his descent from the person last seised, when he claims as lineal heir, or the descent of himself and the person last seised from some common ancestor, or at least from two brothers or sisters,(*i*) if he claims collaterally; together with the extinction of all those lines of descent which would claim before him. This is done by proving the marriages, births, and deaths, necessary to complete his title, and showing the identity of the several parties.

Thus, supposing *A.* the claimant, and *B.* the person last seised, to be cousins, descended from a common ancestor *C.*, *B.* being the only child of *D.*, the elder son of *C.*, and *A.* the only child of *E.*, the younger son of *C.* In this case *A.* must prove the marriage of *C.*, the birth and marriage of *D.*, the birth, marriage, and death of *E.*, the birth and death without issue of *B.*, and his own birth;(*j*) for it is a maxim of law, that he who asserts the death of another, who was once living, must prove his death, whether the affirmative issue be that he be dead or living.(*k*)

(*h*) B. N. P. 103.
(*i*) *Roe*, d. *Thorne*, v. *Lord*, 2 W. Blk. 1099.
(*j*) 2 Blk. Comm. 208, &c.
(*k*) *Wilson* v. *Hodges*, 2 East, 312.

[9] Where the ancestor died in possession, and his son and heir succeeded, and continued in undisturbed possession for 18 years, it was held, that a purchase of the title by the ancestor might be presumed. *Jackson* v. *M'Call*, 10 Johns. 377.

The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the production of extracts from parish registers, are the most satisfactory modes of proving facts of this nature; and when the claimant is the lineal descendant of the person last seised, but little difficulty can arise in procuring the necessary proofs. But when he claims as collateral heir, and it is necessary to trace the relationship between him and the person last seised through many descents to a common ancestor, difficulties often intervene, from the remoteness of the period to which the inquiries must be directed, which, upon the ordinary rules of evidence, would be insuperable. To remedy this evil, the courts, from the necessity of the case, have relaxed those rules in inquiries of this nature; and allow hearsay and reputation (which latter is the hearsay of those, who may be supposed to have known the fact, handed down from one to another) to be admitted as evidence in cases of pedigree.(*l*)[1][2]

Thus, declarations of deceased members of the family are admissible evidence to prove relationship; as who was

(*l*) *Higham* v. *Ridgway*, 10 East, 120.

[1] In an action of ejectment the lessors, who claimed to be heirs, resided in England, a witness here deposed that he knew the ancestor, and had charge of his land as agent, and corresponded with him, and after his death with the lessor, who sent him a power of attorney to act for him as heir and devisee, and that his information was also derived from persons acquainted with the lessor's family; it was held, this was *prima facie* sufficient evidence of pedigree to go to the jury. (*Spencer*, J. dissenting.) *Jackson* v. *Cooley*, 8 Johns. 128.

[2] Where witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard, their testimony will not be received to prove a pedigree. *Jackson* v. *Browner*, 18 Johns. 37.

a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like, of which it cannot reasonably be presumed, that better evidence is to be procured.(*m*)[3] So also declarations made by a deceased husband, as to the legitimacy of his wife, are evidence, though he was not related to her by blood; for the husband must be supposed to have more intimate knowledge on that subject than a distant relation.(*n*) In like manner the declarations of parents, as to whether they were ever married, or whether their children were born before or after marriage, is admissible evidence; although their declarations cannot be received to bastardize their children born in wedlock.(*o*)[4]

But hearsay evidence is not admissible to prove the *place* of any particular birth; for that is a question of locality only, and does not fall within the principle of the rules applicable to cases of pedigree:(*p*) nor are the opinions of deceased neighbours, or of the acquaintances of the family, evidence on questions of this nature;(*q*) nor is

(*m*) B. N. P. 294.

(*n*) *Vowels* v. *Young*, 13 Vez. jun. 148.

(*o*) *Goodright*, d. *Stevens*, v. *Moss*, Cowp. 591.

(*p*) *Rex* v. *Inhabitants of Erith*, 8 East, 542.

(*q*) *Vowels* v. *Young*, 13 Vez. 147, 514. *Rex* v. *Inhabitants of Eriswell*, 3 T. R. 707, 723. *Weeks* v. *Sparke*, 1 M. & S. 688. *et vide* 14 East, 330.

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[3] Hearsay is admissible evidence of the death of a person. *Jackson* v. *Boneham*, 15 Johns. 226.

[4] Declarations *in extremis* are inadmissible, except in the single instance of homicide. *Wilson* v. *Boerem*, 15 Johns. 286.

The declarations of a person, who is himself a competent witness, cannot be given in evidence. *Woodard* v. *Paine* & *Lake*, 15 Johns. 493.

the hearsay of a relative to be admitted when the relative himself can be produced.(*r*) It is also necessary, in order to entitle the declarations of a deceased relative to be admitted, that they should be made under circumstances, when the relation may be supposed without an interest, and without a bias; and, therefore, if they are made on a subject in dispute after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received, on account of the probability that they were partially drawn from the deceased, or, perhaps, intended by him to serve one of the contending parties.(*s*)

Entries in family bibles, or other books, may likewise be received in evidence in questions of pedigree.(*t*) So also recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in a family mansion, and the like.(*u*) And where a will of a deceased ancestor was found, amongst the papers of the person last seised, cancelled, and no evidence was given of its having ever been proved or acted upon, it was nevertheless allowed to be read in evidence as a paper relating to the family; the place in which it was found being considered as amounting to its recognition, by the party last seised,as the declaration of his ancestor concerning the state of his family.(*v*) And in a late case, proof by one of the family, that a particular person had many years before gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married, was held good

(*r*) *Pendrell* v. *Pendrell*, Strau. 457.

(*s*) *The case of the Berkeley Peerage*, 4 Campb. 401.

(*t*) *Whitlocke* v. *Baker*, 13 Vez. 294. *Harrison* v. *Blades*, 3 Campb. 514.

(*u*) *Vowels* v. *Young*, 13 Vez. 148.

(*v*) *Doe*, d. *Johnson*, v. *Lord Pembroke*, 11 East, 505.

prima facie evidence of the person's death without lawful issue.(*w*)

The original visitation books of heralds, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them on oath, are allowed to be good evidence of pedigrees.(*x*)

When the lessor claims as heir to copyhold premises, he must, in addition to the foregoing evidence, produce the rolls of the manor,(*y*) which show a surrender to him, or to those under whom he claims; but it is not necessary that he should prove his own admittance, unless the ejectment be against the lord.(*z*) If, however, the ejectment is against the lord, he must either show that he is admitted, or that he has tendered himself to be admitted and been refused; but it is not necessary to tender himself to be admitted at the lord's court, if the steward, upon application out of court, has refused to admit him.(*a*)

When he claims as *customary heir*, he must, after proving his pedigree, show that he is heir strictly within the custom, for every custom which departs from the common law is construed strictly; and if the custom be silent, the common law must regulate the descent.(*b*) Thus, where the custom is that the eldest *sister* shall inherit, the eldest

(*w*) *Doe*, d. *Banning*, v. *Griffin*, 15 East, 293. *et vide* 19 Car. II. c. 6. s. 1. *Doe*, d. *George*, v. *Jesson*, 6 East, 80.

(*x*) 2 S. N. P. 772.

(*y*) *Post*. 270.

(*z*) *Rumney* v. *Eves*, 1 Leon, 100. *Holdfast*, d. *Woollams*, v. *Clapham*, 1 E. R. 600. *Doe*, d. *Tarrant*, v. *Hellier*, 3 T. R. 162. *Ante*, 66.

(*a*) *Doe*, d. *Burrell*, v. *Bellamy*, 2 M. & S. 87. *Ante*, 67.

(*b*) Co. Copy, 43.

aunt, or *niece*, is not within it.(*c*) So, also, if the custom be that the youngest *son* shall inherit, it will not extend to the youngest *nephew*.(*d*)

The usual method of proving these several customs, is by means of the different admissions of the customary heirs upon the court rolls of the manor, produced by the steward upon oath, or by the medium of verified examined copies. But if the ancient court rolls should be lost, or there should be no instance of an admission upon them, similar to the custom set up by the lessor, an entry upon the rolls, stating the mode of descent of lands in the manor, will be admissible evidence as to the existence of the custom.(*e*) Where, however, the lessor claimed as youngest nephew, and produced, as the only evidence to support his title, an admission upon the court rolls of a youngest nephew, as customary heir, at a court-leet and baron held in 1657; and for the defendant it appeared upon the same rolls, that at a court-leet and baron held in 1692, the jury and homage found, that the custom of descent extended only to the youngest son, and if no son, to the youngest brother, and no farther; (which entry was corroborated by two old witnesses, who testified, that they had heard and believed that the custom went no farther;) upon a verdict being found for the lessor of the plaintiff, the Court refused to set it aside.(*f*)

It may here be useful to observe, that when the lessor claims as heir, and proves his pedigree and stops, and the defendant sets up a new case, which is answered by fresh

(*c*) *Radcliff* v. *Chaplin*, 4 Leon. 242.

(*d*) 1 Roll. 624.

(*e*) *Roe*, d. *Beebee*, v. *Parker*, 5 T. R. 26. *Denn*, d. *Goodwin*, v. *Spray*, 1 T. R. 466.

(*f*) *Doe*, d. *Mason*, v. *Mason*, 3 Wils. 63.

evidence on the part of the lessor, the defendant is entitled to the general reply.(*g*) And if, after the pleadings are opened by the junior counsel for the lessor, the defendant's counsel expresses himself ready to admit the lessor to be the heir, it will entitle him to open the case, and make the first address to the jury.(*h*)

When the lessor claims as the devisee of a freehold interest at common law, or of a customary freehold where there is no custom to surrender to the use of the will,(*i*) he must prove the seisin of his devisor,(*j*)[5] and the due execution of the will, (unless it be more than thirty years old,) pursuant to the provisions of the statute 29 Car. II. c. 3. s. 5. If, however, the will be thirty years old, or upwards, it may be read in evidence without proof;[6] and, it seems,

(*g*) *Goodtitle*, d. *Revett*, v. *Braham*, 4 T. R. 497.

(*h*) So ruled by *Le Blanc*, J. in *Fenn*, d. *Wright*, v. *Johnson*, Nottingham Summer Assizes, 1813, MS. and by *Wood*, B. in a subsequent ejectment between the same parties, Nottingham Lent Assizes, 1814, MS.—But ruled *contra* by *Gibbs*, J. in a previous ejectment between the same parties, Derby Lent Assizes, 1813, MS. on the principle that a defendant cannot compel a plaintiff to receive admissions.

(*i*) *Hussey* v. *Grills*, Amb. 299.

(*j*) *Ante*, 252.

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[5] A devise of land held adversely is void, and it descends to the heir. *Smith* v. *Vandeusen*, 15 Johns. 343.

[6] An ancient will stands on the same rule of evidence with an ancient deed. In order that a will may be given in evidence as an ancient deed, there should have been a possession of thirty years in conformity to it. *Jackson* v. *Blanshan*, 3 Johns. 292.

It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed, and where possession fails, the length of time from the date will not help the deed. *Ibid.* 297.

But where the premises in question were in a wild and uncultivated state, and upon the will were endorsed certificates of its execution, and of its being recorded, by persons whose hand-writing could be proved, the will was allowed to be given in evidence. (*Kent*, J. dissenting.) *Jackson* v. *Larroway*, 3 Johns. Cas. 283.

that the age of the will is to be reckoned from the day it bears date, and not from the time of the testator's death.(*k*)

The statutory regulations for the execution of wills, containing devises of freehold lands, are to be found in the fifth section of the statute of frauds,(*l*) whereby it is enacted, that, "all devises and bequests of any lands, or tenements, "devisable either by force of the statute of wills, or by "that statute, or by force of the custom of Kent, or the "custom of any borough, or any other particular custom, "shall be in writing, and signed by the party so devising "the same, or by some other person in his presence, and "by his express direction, and shall be attested and sub-"scribed, in the presence of the devisor, by three or four

(*k*) *M'Kenire* v. *Frazer*, 9 Vez. jun. d. *Calthorpe*, v. *Gough*, 4 T. R. 707. 5. *et vide n.* 1 to the case of *Gough*, (*in notis.*)

(*l*) 29 Car. II. c. 3.

The acts and declarations of third persons in possession, are admissible to prove a possession under an ancient will, so as to entitle it to be read as an ancient deed. *Jackson* v. *Vandeusen*, 5 Johns. 144.

In the case of *Garwood* v *Dennis*, (4 Binney, 314.) the Supreme Court of Pennsylvania decide, that in the case of an ancient deed, of the loss of which some evidence has been given, where the possession has not been contrary to the deed, and where the subscribing witnesses have been long dead, a recital in another deed, particularly if made by persons likely to know the fact, is evidence of the lost deed. So a deed containing such a recital, by a person to whom the lost deed is alleged to have been given, and who has been in the possession a long time, may be evidence to show the nature of his possession, and that he exercised acts of ownership, and held under the lost deed.

The Supreme Court of the United States have decided, in the case of *Barr* v. *Gratz*, (4 Wheaton, 215, 221.) that a deed more than 30 years old, proved to have been in the possession of plaintiff, and actually asserted by him as the ground of his title in a Chancery suit, was admissible without regular proof of its execution.

A deed cannot be given in evidence until some interest is shown in the grantor. *Lessee of Peters* v. *Coudron*, 2 Serjeant & Rawle's Penn. Rep. 80. But this rule cannot apply to an ancient deed.

" credible witnesses, or else shall be utterly void and of " none effect."

This section of the statute of frauds is very loosely worded, and it will be necessary to enter rather largely into the different points, which have arisen respecting the due execution of a will under it.

The first solemnity required is the signature of the testator; but it is not necessary that he should sign his name at the bottom of the will; it is sufficient if his name be in any part of it in his own handwriting. As, for instance, a will in the handwriting of the testator, beginning with the words, " I, *A. B.*, do make this my last will," has been held to be properly signed :(*m*) and if the testator cannot write, his mark will be a sufficient signature.(*n*) But if the will be on several sheets, and it appear to have been the intention of the testator to sign every one, but, from weakness or incapacity, he leave some of them unsigned, it will not, it seems, be a sufficient execution within the statute.(*o*) The effect of sealing alone is not yet quite decided; but it is the better opinion, that it is not a sufficient signature.(*p*)

It is not required by the statute, that the witnesses should see the devisor sign, or that he should sign in their presence, or that they should be informed of the nature of the instrument they are about to attest; it is sufficient, if the devisor declare to them, that the signature is his handwrit-

(*m*) *Lemayne* v. *Stanley*, 3 Lev. 1.

(*n*) *Harrison* v. *Harrison*, 8 Ves. jun. 185. and *Addy* v. *Grix*, 8 Ves. jun. 504.

(*o*) *Right*, d. *Cator*, v. *Price*, Doug. 241.

(*p*) *Lemayne* v. *Stanley*, 3 Lev. 1. *Lee* v. *Libb*, 1 Show. 69. S. C. Carth. 35. *Warneford* v. *Warneford*, Stran. 764. *Smith* v. *Evans*, 1 Wils. 313. *Ellis* v. *Smith*, 1 Ves. jun. 11. S. C. 1 Dick. 225.

ing, or even, it seems, without such declaration, if the whole body of the will, as well as the name be written by himself.(*q*) And in a late case where the testator was blind, the Court of Common Pleas determined, that it was not necessary on that account, under the statute, to read over the will, previous to the execution, in the presence of the attesting witness; although, if there were other circumstances inducing a suspicion of fraud, such an execution would materially strengthen the presumption.(*r*)

The next formality is the attestation and subscription. It must be attested and subscribed by three, or more witnesses, but it is not necessary that the attestation and subscription of all the witnesses should be at one time. Hence, where the devisor published his will in the presence of two witnesses, who subscribed it in his presence, and some time after he sent for a third witness, and published it in his presence also, the will was holden to be duly attested.(*s*) But it is necessary that all the witnesses attest the *same instrument*, and that the instrument attested be that by which the lands are intended to pass. Therefore, where a testator devised his lands by a will, made in the presence of, and attested by two witnesses only, and about a year after made a codicil, whereby he revoked a legacy given by his will,[7]

(*q*) *Grayson* v. *Atkinson*, 2 Ves. 454. *Ellis* v. *Smith*, 1 Ves. jun. 11. S. C. 1 Dick. 225. *Trymner* v. *Jackson*, cited 1 Ves. 487. recog. 2 Ves. 258. *Stonehouse* v. *Evelyn*, 3 P. Wm. 255. *Peate* v. *Ougly*, Comyn, 197.

(*r*) *Longchamp*, d. *Goodfellow*, v. *Fish*, 2 N. R. 415.

(*s*) *Gryle* v. *Gryle*, 2 Atk. 17. (n.) *Ellis* v. *Smith*, 1 Ves. jun. 11. 14. *Grayson* v. *Atkinson*, 2 Ves. 454. 458.

[7] Parol evidence of the revocation of a will is inadmissible, for the statute declares no will shall be revoked except in writing. *Jackson* v. *Kniffen*, 2 Johns. 33.

and declared that the will should be ratified and confirmed in all things, except as altered by that writing, and that his codicil should be taken as part of his will;[8] and executed this codicil in the presence of one of the former witnesses and another person, neither the first will, nor the other witness to it, being present, it was holden to be an insufficient attestation.(*t*) And where a testator, by a will *not witnessed*, devised lands, and afterwards made a codicil, and taking the codicil in one hand, and the will in the other, said, "This is my will whereby I have settled my estate, and I publish this codicil as part thereof," the signature of the codicil, by the testator and three witnesses, was held insufficient to render the will valid.(*u*) But if there be several instruments written by the testator upon one paper, and it plainly appear that his intention was, that all should form but one will, and not a will and codicil, in such case, the execution of the last instrument will be considered as an execution of the whole.(*v*)[9] So, also, if a will be

(*t*) *Lee* v. *Libb*, 3 Lev. 1. S. C. Carth. 35.

(*u*) *Penphrase* v. Lord *Lansdown*, cited Com. 384. *Attorney General* v. *Barnes*, Prec. Cha. 270.

(*v*) *Carleton*, d. *Griffin*, v. *Griffin*, Burr. 549.

The mere act of cancelling a will is nothing, unless it be done *animo revocandi*. *Jackson* v. *Halloway*, 7 Johns. 394.

[8] A devise of lands will not pass lands acquired subsequently to the execution of the will without a republication. *Jackson* v. *Halloway*, 7 Johns. 394. *Jackson* v. *Potter*, 9 Johns. 312.

A republication must be made with the same solemnities as the original will. *Jackson* v. *Potter*, 9 Johns. 312.

Where devisor made a memorandum on his will to make a devise extend to all his lands, which was attested by only two witnesses, it was held inoperative. *Jackson* v. *Halloway*, 7 Johns. 394.

[9] A will may be construed in connexion with another instrument in writing to which it refers. *Jackson* v. *Babcock*, 12 Johns. 389.

written upon several sheets of paper, but at one time, it will be valid, although all the sheets are not executed by the testator, nor signed by the witnesses, nor even seen by them, provided the last sheet be regularly signed and attested, and every part of the will be present at the time of the execution; of which latter fact the presumption of law will be in favour, should the different sheets correspond.(w)[1]

The attestation and subscription of the witnesses must be in the presence of the testator, but proof need not be given, that the testator *actually did see* the witnesses subscribing: their attestation is sufficient, if it appear that he *might see them.* Thus, where the witnesses signed in a room adjoining to the one which contained the testator's bed, upon a table opposite to the door of communication, it was holden to be sufficiently in the testator's presence.(x) So, also, where the testator executed his will in his carriage, and the witnesses signed their names in a room hard by, the carriage being in such a situation as to enable the testator to see what was passing in the room, the will was held

(w) *Bond* v. *Seawell*, Burr. 1773. S. C. W. Blk. 407. B. N. P. 264.

(x) *Shires* v. *Glascock*, Salk. 688. *Davy* v. *Smith*, 3 Salk. 395.

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[1] An alteration, whether material or immaterial, made in a will, by a person claiming under it, renders it void. *Jackson* v. *Malin*, 15 Johns. 297. "But," (says Mr. Justice *Platt* in that case,) "I do not agree with the opinion expressed in *Pigot's* case, (11 Co. 26.) that a material alteration, though made by a stranger, and without the privity of the person claiming under it, renders it void. See 3 T. R. 151. 4 T. R. 320. 5 Taunt. 707. 2 Pothier, by Evans, 179, 180, 181.

The Supreme Judicial Court of Massachusetts have decided, (9 Mass. Rep. 307. *Hatch* v. *Hatch*,) that a material alteration will not avoid a deed. The cancelling of a deed would not devest property that had passed by it, and the deed as altered was evidence for the consideration of a jury.

to be valid.(*y*) But if the testator could not possibly see the witnesses subscribe, as if they subscribe in another room out of sight, although by the testator's express directions, the execution will not be good: the design of the statute being to prevent a wrong paper from being intruded on the testator in the place of the true one.(*z*) And upon this principle, if the testator, between the time of his own subscription, and the subscription of the witnesses, lose his mental powers, it will invalidate the will, although signed in his presence.(*a*)

The clause of attestation generally expresses, that the witnesses subscribed in the presence of the testator; but such a statement is not absolutely necessary, and if omitted, the jury will not be concluded from finding that the will was duly subscribed, althongh all the witnesses are dead, and their signatures proved in the common way.(*b*)

With respect to the credibility of the attesting witnesses, it may be observed generally, that they must, at the time of their attestation,(*c*) have the use of their reason,(*d*) be sensible of the obligation of an oath,(*e*) and unconvicted of any infamous crime.(*f*) Formerly a devisee, taking a beneficial interest under the will, was considered not a credible witness to prove its execution within the intent of the

(*y*) *Casson* v. *Dade*, 1 Bro. C. C. 99.

(*z*) *Eccleston* v. *Petty*, Carth. 79. *Broderick* v. *Broderick*, 1 P. Wms. 239. *Machel* v. *Temple*, 2 Show. 288.

(*a*) *Right*, d. *Cator*, v. *Price*, Doug. 241.

(*b*) *Hands* v. *James*, Com. 531. *Brice* v. *Smith*, Willes, 1. *Croft* v. *Pawlet*, Stran. 1109.

(*c*) *Pendock*, d. *Mackinder*, v. *Mackinder*, Willes, 665.

(*d*) Gilb. Evid. 109.

(*e*) Hales, P. C. 2 vol. 279—*Omichund* v. *Barker*, Willes, 538.

(*f*) 31 Geo. III. c. 35. *Chater* v. *Hawkins*, 3 Lev. 426.

statue ;(g) but doubts being entertained, whether his credibility might not be restored by a release, payment, or extinguishment of all his interest,(h) it is enacted by the statute 25 G. II. c. 6., (after reciting that it had been doubted who were to be deemed legal witnesses within the statute of frauds,) " that if any person shall attest the execution of " any will or codicil, (to whom any beneficial devise, le- " gacy, estate, interest, gift, or appointment, affecting any " real or personal estate, except charges on land, &c. for " payment of debts shall be given,) such devise, legacy, &c. " shall, so far only as concerns such person attesting the " execution, or any person claiming under him, be utterly " null and void; and such person shall be admitted as a " witness to the execution of such will or codicil, within " the intent of the said act, notwithstanding such devise, " legacy, &c. And in case any will or codicil shall be " charged with any debt, and any creditor, whose debt is " so charged, shall attest the execution of such will or co- " dicil, every such creditor, notwithstanding such charge, " shall be admitted as a witness to the execution of such " will or codicil, within the intent of the said act. Pro- " vided, always, that the credit of every such witness, so " attesting the execution of any will or codicil, in any of " the cases within this act, and all circumstances relating " thereto, shall be subject to the consideration and deter- " mination of the Court and the jury, before whom any " such witness shall be examined, or his testimony, or at- " testation made use of, in like manner as the credit of wit- " nesses in all other cases ought to be considered and de- " termined." It seems, however, notwithstanding the provisions of this statute, that a married woman is not a credi-

(g) *Hilliard* v. *Jennings*, 1 Ld. Raym. 505. S. C. Com. Rep. 91.

(h) Vide *Anstey* v. *Dowsing*, 2 Strau. 1253. *Wyndam* v. *Chetwynd*, 1 Burr. 414.

ble witness to attest a will under which her husband takes a beneficial interest.(*i*)[2]—[3]

The result of the foregoing inquiry seems to be, that in order to prove a will duly executed within the statute of frauds, it must appear that it was signed by the testator; that it was published by him in the presence of three or more credible witnesses, either at the same, or different times; that the witnesses subscribed their names respectively in the presence of the testator; and that they all signed the same instrument.

To prove these facts, the original will should be produced, and one of the subscribing witnesses must be called to show that the solemnities required by the statute have been complied with. And if such witness can prove the whole execution, (as that the testator signed in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them, and that each of the witnesses subscribed in his presence,) this will be sufficient proof of the will, without calling the others. But if the witness who is called can only prove his own share of the transaction, as must happen where the testator acknowledged his signing to the witnesses separately, the other witnesses ought in that case to be called.(*j*) If, also, the will is disputed by

(*i*) *Bettison* v *Bromley*, 12 *East*, 250. (*j*) *Phillipps' Evidence*, 3d. Edit. 439.

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[2] A devise to a witness is absolutely void *ab initio*, so that, although he grants away all his interest, he cannot become a competent witness to establish the devise. *Jackson* v. *Denniston*, 4 Johns. 311.

[3] If either husband or wife be a witness to a will containing a devise to the other, the devise is absolutely void, and the party is a competent witness to the will. *Jackson* v. *Woods*, 1 Johns. Cas. 163. *Jackson* v. *Durland*, 2 Johns. Cas. 314.

the heir at law, he is always entitled to the testimony of all the subscribing witnesses; but then he must produce them himself, if the testimony of one is sufficient for the devisee. If, however, all the witnesses are dead,[4] or insane, or out of the jurisdiction of the court, proof of the hand-writing of the devisor and witnesses, or of the devisor alone, if no proof of the hand-writing of the witnesses can be obtained, will be sufficient without evidence of the solemnities.(*k*)[5] If the will be lost, an examined copy of it should be produced, or parol evidence be given of its contents;[6] but

(*k*) *Hands* v. *James*, Com. 531. *Croft* v. *Pawlett*, Stran. 1109.

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[4] The testimony of a deceased witness in a former suit, is evidence not only where the same point in issue afterwards arises between the same parties, but also against persons standing in the relation of privies in blood, privies in estate, or privies in law. *Jackson* v. *Lawson*, 15 Johns. 539.

But the party offering such evidence must show the witness to be dead. *Powell* v. *Waters*, 17 Johns. 176.

Where a subscribing witness in the state was too aged and infirm to attend the trial, proof of his hand-writing was excluded, for his examination should have been taken under the statute, or by order of Court. *Jackson* v. *Root*, 18 Johns. 60.

[5] Where subscribing witnesses to a will were all dead, and one of them had signed the initials of his name as his mark, and a witness swore, that from a comparison with another paper signed by the subscribing witness in the same manner, he believed the mark to the will to be made by the witness, this was held sufficient evidence to go to the jury, when accompanied by evidence of possession by the devisees under the will. *Jackson* v. *Vandusen*, 5 Johns. 144.

[6.] To entitle a party to give parol proof of a will, on the ground of its being lost, he must show a search in the office of the Surrogate of the County, where testator died, (or in the office of the Judge of Probates,) and an inquiry of the executors. *Jackson* v. *Hasbrouck*, 12 Johns. 192.

Evidence that a deed was left in the clerk's office to be recorded, and that upon search it cannot be found, is not sufficient to show its loss, without showing that it was never re-delivered by the clerk. *Jackson* v. *Todd*, 3 Johns. 300.

Where plaintiff derived title from A., who derived title from B., he could

the probate, under the seal of the Ecclesiastical Court, will not be admitted as such secondary evidence, because the Ecclesiastical Court has no control over devises of lands.(*l*) When also the will remains in Chancery, a copy of it will be good evidence.(*m*)[7]

If a subscribing witness should deny the execution of the will, he may be contradicted as to that fact by another subscribing witness;(*n*) and even if they all swear, that the will was not duly executed, the devisee will be allowed to go into circumstantial evidence to prove its due execution.(*o*)[8] So, also, if one of the subscribing witnesses im-

(*l*) *Doe*, d. *Ash*, v. *Calvert*, 2 Campb. 389.

(*m*) *Eden* v. *Chalkill*, 1 Keb. 117.

(*n*) *Vide Alexander* v. *Gibson*, 2 Campb. 556.

(*o*) *Lowe* v. *Jolliffe*, W. Blk. 365. *Pike* v. *Badmering*, cited Stran. 1096. Gilb. Evid. 69. B. N. P. 264.

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not give in evidence the declarations of A. and B., as to the loss of the deed from B. to A *Jackson* v. *Cris*, 11 Johns. 437.

To prove the loss of a written instrument, search and inquiry must be shown of those persons who would have the paper if it existed. *Jackson* v. *Frier*. 16 Johns. 193. The evidence of loss is matter exclusively for the consideration of the judge, who is not bound by the rules in relation to testimony to a jury, but may admit the evidence of an interested witness, or the party himself.

The same observation applies to the proof, that a subscribing witness to a deed could not be found. *Ibid.*

In regard to the proof of loss of instruments, there is much less strictness with regard to those which have ceased to be of value as evidences, and muniments of title, than to those which have not. *Jackson* v. *Root*, 18 Johns. 60.

[7] The record of a will, proved in open court under the statute, (1 Rev. Laws, N. Y. 365.) is only *prima facie* evidence of its authenticity, and is not conclusive upon the heir, so as to prevent the admission of evidence to impeach its validity. It is only *prima facie* evidence of its authenticity. *Jackson* v. *Rumsey*, 3 Johns. Cas. 234.

[8] Parol evidence may be given to show that a testator executed a will under duress, but the declarations of a testator, though made *in extremis*, are inadmissible. *Jackson* v. *Kniffen*, 2 Johns. 33.

peach the validity of the will on the ground of fraud, and accuse other witnesses, who are dead, of being accomplices in the fraud, the devisee may give evidence of their general character.(*p*)

When an ejectment is brought by the devisee of a copyholder, he must prove the admission of the testator, the surrender to the use of the will, and his own admittance.(*q*) And these facts will be sufficiently established, by producing the original entries on the rolls of the manor by the proper officer, (which entries the courts will compel the lord to permit his tenant to inspect,(*r*)) and proving the identity of the parties admitted ;(*s*) without also showing a copy of such surrender and admittances stamped, as required by the stat. 55 Geo. III. c. 184.(*t*) The will of the devisor must likewise be proved ; but as copyhold lands are not within the statute of frauds, it will be sufficient to show a will in writing,(*u*) although it be neither signed by the testator, nor attested by any witnesses.(*v*) Indeed, even short notes taken by an attorney for the purpose of drawing up a will, where the party died before the will could be completed, have been held sufficient to pass copyhold premises.(*w*)

It has been said, that any paper, which the Ecclesiastical Court would hold to be a will, shall be sufficient to pass a copyhold previously surrendered,(*x*) and it is, therefore,

(*p*) *Doe*, d. *Walker*, v. *Stephenson*, 3 Esp. 284. S. C. 4 Esp. 50.

(*q*) *Roe*, d. *Jefferey*, v. *Hicks*, 2 Wils. 13. *Doe*, d. *Vernon*, v. *Vernon*, 7 East, 8 *Ante*, 66.

(*r*) *Folkard* v. *Hemet*, W. Blk. 1061. *The King* v. *Shelly*, 3 T. R. 141.

(*s*) *Doe*, d. *Hanson*, v. *Smith*, 1 Campb. 197.

(*t*) *Doe*, d. *Bennington*, v. *Hall*, 16 East, 208.

(*u*) 32 Hen. VIII. c. 1.

(*v*) *Nash* v. *Edmunds*, Cro. Eliz. 100. *Doe*, d. *Cook*, v. *Danvers*, 7 East, 299.

(*w*) 1 Ander. 34. 85.

(*x*) *Carey* v. *Askew*, 2 Bro. Cha. Rep. 58.

usual to produce the probate, as well as the original paper-writing; but this probate does not appear to be necessary, for it seems that the Courts of Common Law may enter into the question, whether the paper amounts to a will, although no probate has in fact been granted.(*y*)

If the lessor be the legatee of a term for years, he must give in evidence the probate of the will, and prove the assent of the executor to the devise; for where a person devises either specifically or generally, goods or chattels, real or personal, and dies, the devisee cannot take them without the assent of the executors.(*z*) He must also prove the title of his testator, and show that he had a chattel and not a freehold interest in the premises; because, when a party dies in possession, it is presumed that he is seised in fee until the contrary is shown.(*a*) This is most commonly done by the production of the lease: but in a late case, where the lessor put in an answer of the defendants to a bill in equity, in which the defendant stated, that "he believed the lessor was *possessed* of the *leasehold* premises in the bill mentioned," it was held, as against the defendant, sufficient evidence that the interest of the testator was only a chattel interest.(*b*)

When an ejectment is brought by a personal representative, he must produce the probate of the will, or letters of administration, or the book of the Ecclesiastical Court, wherein they are entered, in addition to the proof of his testator's or intestate's title.(*c*)

(*y*) *Doe*, d. *Smith*, v. *Smith*, Peake's Evid. 456.

(*z*) 1 Inst. 111 (*a*) *Ante*, 73.

(*a*) *Ante*, 252.

(*b*) *Doe*, d. *Digby*, v. *Steel*, 3 Campb. 115.

(*c*) *Garrel* v. *Lister*, 1 Lev. 25. *Elden* v. *Keddell*, 8 East, 187. Cont. B. N. P. 108.

When an ejectment is brought by the surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance; but it is immaterial whether the admittance be before or after the day of the demise in the declaration.(*d*)

When the lessor of the plaintiff is the lessee for years of a copyholder, he must, after proving his lessor's title, show either a special custom in the manor, allowing the copyholder to make leases for years, or that the licence of the lord was obtained before the lease was granted.(*e*)

When an ejectment is brought by a tenant by *elegit*, and the debtor is himself in possession of the land, the only evidence necessary is an examined copy of the judgment roll, containing the award of the *elegit*, and return of the inquisition. If, however, the possession is in a third person, the lessor must either show that such third person came into possession under the debtor, and that his right to the possession has ceased, or (should the party in possession hold adversely to the debtor) be prepared with evidence of his debtor's title.(*f*) It is not necessary in any case to prove a copy of the *elegit* and inquisition.(*g*)

The conusee of a statute merchant, when the debtor is in possession, must prove a copy of the statute, of the *capias si laicus*, extent and *liberate* returned; for although by the return of the extent an interest is vested in the conusee, yet the actual possession of that interest is acquired by the *liberate*.(*h*) The same proofs are also necessary when a

(*d*) *Ante*, 66.
(*e*) Co. Copy, s. 51.
(*f*) *Doe*, d. *Da Costa*, v. *Wharton*, 3 T. R. 2.
(*g*) *Ramsbottom* v. *Brickhurst*, 2 M. & S. 565.
(*h*) *Hammond* v. *Wood*, 2 Salk. 563.

third person is in possession, as in the case of a tenant by *elegit*.

When a parson brings ejectment for the parsonage-house, glebe, or tithes, he must prove his admission, institution, and induction;(*i*) but he need not show a title in his patron, for institution and induction, although upon the presentation of a stranger, are sufficient to put the rightful patron to his *quare impedit*.(*j*)

Proof was also formerly required that he had read and subscribed the thirty-nine articles, according to the statute, and declared his assent and consent to all things contained in the book of Common Prayer; but this is no longer held to be necessary, unless some ground be laid by the defendant to show that he has not complied with these requisites; because the presumption is, that every man has conformed to the law, until there be some evidence to the contrary.(*k*)

Entries made by a deceased rector in his books, may be given in evidence by his successor,(*l*) upon a question of tithes; and he is also entitled to give in evidence such terriers as have been regularly made and preserved in the proper repository; that is to say, such terriers as are signed by a churchwarden, or (if the churchwardens are nominated by the parson) by some of the substantial inhabitants of the parish,(*m*) and are found either in the bishop's register office,(*n*) or in the registry of the archdeacon of the diocese.(*o*)

(*i*) *Snow* v. *Phillips*, 1 Sid. 220.

(*j*) B. N. P. 105.

(*k*) *Powel* v. *Milburn*, 3 Wils. 355. S. C. 2 W. Black. 851.

(*l*) *Glyn* v. *Bank of England*, 2 Ves. 38. 43. *Roe*, d. *Brune*, v. *Rawlings*, 7 East, 279. 290.

(*m*) B. N. P. 248. *Earl* v. *Lewis*, 4 Esp. 3.

(*n*) *Atkins* v. *Hatton*, 4 Gwill. 1406.

(*o*) *Potts* v. *Durant*, 4 Gwill. 1460. 1454.

It is not necessary that the terrier should be signed by the parson; but, unless it possesses the marks of authenticity above mentioned, it cannot in general be received in evidence. But where a terrier was found in the registry of the dean and chapter of Litchfield, it was admitted in evidence against one of the prebendaries upon the principle, that there appeared to be a proper connexion between the terrier and the place where it was found.(*p*)

An ejectment for a parsonage and glebe, will not be supported by showing that the defendant entered and took the tithe belonging thereto; because the tithes and the rectory are not the same.(*q*)

When a lay impropriator brings an ejectment for tithes, the strict proof of title is to show, that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims;(*r*) but, as deeds and instruments are liable to be lost, length of possession, and old deeds conveying tithes, have been deemed sufficient evidence of title.(*s*)

When an ejectment is brought by a guardian in socage, he must prove, in addition to the title of his ward, that he (the ward) is under fourteen years of age;(*t*) and upon the same principle, when a testamentary guardian is the lessor, he must show the age of his ward to be less than twenty-one years.

When the assignees of a bankrupt are the lessors of the

(*p*) *Miller* v. *Foster*, 4 Gwill. 1406.
(*q*) *Hem* v. *Stroud*, Latch. 61.
(*r*) *Vide* Com. 651.
(*s*) *Kinaston* v. *Clarke*, 5 T. R. 265, *in notis*.
(*t*) *Doe*, d. *Rigge*, v. *Bell*, 5 T. R. 471.

plaintiff, they must give evidence of the assignment, bankruptcy, &c. in the same manner, and subject to the same rules, as in other actions.(*u*) They must likewise prove the bankrupt's title to the premises; and, if the lands are freehold, the bargain and sale, and enrolment thereof;(*v*) and also, if his title accrued after his bankruptcy, a special conveyance of them by the commissioners to the assignees.(*w*)

Where several lessors declare upon a joint demise, proof of a joint interest in the whole premises must be given.[9] But, if a demise is laid by each of several lessors separately, they will be entitled to recover, whether they have a joint or several interest, for a several demise severs a joint tenancy.(*x*) And in a case where a joint demise was laid by seven trustees of a charity, who were appointed at different times, and the tenant had paid one entire rent to the common clerk of the trustees, it was held that such payment of rent should enure in the most beneficial way for the trustees in support of their title as brought forward by themselves, unless the defendant expressly proved them to be entitled in a different manner. And it was considered

(*u*) 49 Geo. III. c. 121.
(*v*) Esp. N. P. 431. 438.
(*w*) *Ante* 69.
(*x*) *Doe*, d. *Marsack*, v. *Read*, 12 East, 57.

[9] An admission contained in a recital of a deed of one of the lessors, in an action of ejectment, is evidence against all of them, as he could not be called as a witness, and there was a community of interest among them. *Brandt* v. *Klein*, 17 Johns. 335.

A deed, containing a recital of another deed, is evidence of the recited deed against the grantor, and all persons claiming by title derived from him subsequently. But it is not evidence against one who claims from him by title, prior to the deed containing the recital, nor is it evidence against a stranger. *Penrose* v. *Griffith*, 4 Binney's Penn. Rep. 231.

that the circumstance of their being appointed at different times was not sufficient evidence for that purpose.(*y*)

When an ejectment is brought by one joint-tenant, parcener, or tenant in common, against his companion, the lessor may be called upon to produce the consent rule, and if it appear that a special one has been granted, that the defendant shall confess lease and entry only, the lessor must prove an actual ouster by his co-tenant;(*z*) but if the consent rule be in the common form, it will be sufficient evidence of an ouster.(*a*)

Next, of the proofs required when a privity exists between the defendant and lessor of the plaintiff, or those under whom he claims.

When a privity exists between the parties to the ejectment, the claimant, instead of proving his title, should show the existence and termination of the privity; for a privity will not be presumed to exist without proof, but being proved, the presumption is in favour of its continuance. Thus, if the defendant be let into possession, pending a negotiation for a purchase or a lease, proof must be given of the circumstances under which he was let into possession, and also of the breaking off of the negotiation before the day of the demise in the ejectment. In like manner, if he has become tenant at will of the premises, the lessor must show how he became so, and that the will was determined by demand of possession or otherwise, and so forth.(*b*)

(*y*) *Doe*, d. *Clarke*, v. *Grant*, 12 East, 221.

(*z*) *Ante*, 56.

(*a*) *Doe*, d. *White*, v. *Cuff*, 1 Campb. 173.

(*b*) *Ante*, 98. 111.—In a case, where the landlord by his own negligence,

When the relationship of landlord and tenant regularly subsists between the parties, or those under whom they claim, which is commonly the case in ejectments of this nature, the tenancy may be determined, as we have already observed,(*c*) in three several ways. First, by the efflux of time, or the happening of a particular event. Secondly, by a notice from the landlord to the tenant to deliver up the possession, or *vice versa;* and, thirdly, by a breach on the part of the tenant of any condition of his tenancy, as by the non-payment of rent, or non-performance of a covenant.

When the tenancy is determined by the efflux of time, the lessor has only to prove the counterpart of the lease,(*d*) (for which purpose he must call one of the subscribing witnesses, if capable of being called,) provided the demise be by deed, or the agreement by some person present at the making of it, if it be by parol: and it is not necessary for him also to show, that he, or those under whom he claims, has received the reserved rent within the last twenty years.(*e*)[1]

Where the tenancy is determined by the happening of a

suffered a third person to recover in ejectment against his tenant, who held under a lease, and who attorned to such third person, the court of Chancery restrained the tenant from setting up the lease against an ejectment about to be brought by his landlord, although only one year and three quarters of the term was unexpired.—*Baker* v. *Mellish*, 10 Ves. 544. *et vide Doe*, d. *Powell*, v. *King*, Forrest. 19

(*c*) *Ante*, 101.

(*d*) *Roe*, d. *West*, v. *Davis*, 7 East, 363.

(*e*) *Orrell* v. *Maddox*, Runn. Eject. Appendix, 458.

[1] If the validity of a deed depend on an act *in pais*, party producing it is bound to show the performance of such act. *Williams* v. *Peyton*, 4 Wheaton's U. S. Rep. 77.

particular event, the lessor must, of course, also prove that the event upon which the tenancy is to determine, has happened.

When the tenancy expires by reason of a notice to quit, the lessor must prove the tenancy of the defendant, the service of the notice and its contents, (and if given by an agent, the agent's authority,) and that the notice and the year of the tenancy expire at the same time. When also the notice is for a shorter period than half a year, or expires at any other period than the end of the year of the tenancy, it will be necessary to show the custom of the country where the lands lie, or an express agreement, by which such notice is authorized.(*f*)

The tenancy of the defendant is commonly admitted, and may be proved when necessary, if no direct evidence can be given of the demise, by declarations on the part of the tenant, the fact of payment of rent, (and it is advisable to give the tenant notice to produce his receipts,) or the like.[2]

The service of the notice, and the authority to serve it,

(*f*) *Ante*, 131.

[2] A deed produced at the trial pursuant to a notice, by a party to the deed, is *prima facie* to be taken to be duly executed, and may be read in evidence without proof of its execution. *Betts* v. *Badger*, 12 Johns. 223. On this subject the English decisions are not agreed. See 2 T. R. 44. 1 Esp. Rep. 409. 8 East, 548. 2 Camp. Rep. 94.

But if party producing be not a party to the deed, then evidence of its execution must be produced by the party calling for the deed. *Jackson* v. *Kingsley*, 17 Johns. 158 ; and the circumstance of the names of the subscribing witnesses being torn off, will not exempt the party from the necessity of proving the hand-writing of the party who executed it, there being no evidence that the party producing the deed had mutilated it. *Ibid.*

will be proved by the person who delivered it to the tenant; but if there is a subscribing witness thereto, such subscribing witness must also be called, although it should happen that he only witnessed the signature of the landlord, and did not deliver the notice himself. The contents of the notice may be proved by a duplicate original, which should be compared with the notice actually served, by the party serving it; but if this precaution is not taken, parol evidence may be given of its contents; and it is not necessary in either case, to give the defendant notice to produce the original in his possession.(*g*)

When the notice is given by an agent, it must be shown that he was vested with his authority at the time the notice was given.(*h*) And where two or more joint tenants, &c. are lessors of the plaintiff, and a notice to quit is given by one or more in the name of all, although they all afterwards join in an ejectment, it will not be presumed, from that circumstance, that an authority was originally given by the parties not joining in the notice, to their co-tenants.(*i*) But where a notice to quit was given by the steward of a corporation, it was presumed, inasmuch as he was an officer of the corporation, that he had an authority to give the notice.(*j*)

When the tenant has been long in possession of the premises, it frequently becomes extremely difficult to prove the time of his original entry; but nevertheless, some evidence must be given, from which the jury may presume that the time of the expiration of the notice, and of the

(*g*) *Jory* v. *Orchard*, 2 B. &. P. 41.
(*h*) *Ante*, 120.
(*i*) *Right*, d. *Fisher*, v. *Cuthell*, 5 East, 491. *Ante*, 120.
(*j*) *Roe*, d. *Dean of Rochester*, v. *Pearce*, 2 Campb. 96.

year of the tenancy are the same, or the plaintiff will be nonsuited.

If the tenant has been applied to by his landlord, respecting the time of the commencement of his tenancy, and has informed him that it began on a certain day, and, in consequence of such information, a notice to quit on that day is given at a subsequent period, the evidence is conclusive upon the tenant, and he will not be permitted to prove that, in point of fact, the tenancy has a different commencement: nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into an error.(*k*) When also the tenant, at the time of the service of the notice, assents to the terms of it, he will be precluded from showing that it expires at a wrong time. But such assent must be strictly proved; and in a case where the party made no objection to the notice at the time of its delivery, but said, "I pay rent enough already, it is hard to use me thus;" it was held, that these circumstances were not sufficient to prevent him from showing the time when the tenancy actually commenced.(*l*)

When a notice to quit upon any particular day, is served upon the tenant personally, if he read its contents, or they be explained to him, without any objection being made on his part, as to the time of the expiration of the notice, it will be *prima facie* evidence of a holding from the day mentioned in the notice.(*m*) In like manner, a receipt for a year's rent up to a particular day, is *prima facie* evidence

(*k*) *Doe*, d. *Eyre*, v. *Lambley*, 2 Esp. 635.

(*l*) *Oakapple*, d. *Green*, v. *Copous*, 4 T. R. 361.

(*m*) *Thomas*, d. *Jones*, v. *Thomas*, 2 Campb. 647. *Doe*, d. *Clarges*, v. *Foster*, 13 East, 405.

of a holding from that day.(*n*) But if the notice be not delivered personally, or be not read over or explained to the party, no such presumption will arise, although a contrary doctrine was formerly maintained.(*o*) When also the notice is to quit generally at the expiration of the current year of the tenancy, &c.(*p*) no presumption can arise, as to the time of the commencement of the tenancy, from a personal delivery to the tenant. But where a general notice was delivered on the 22d of March, to quit at the expiration of the current year, &c., and on the 16th of January following, a declaration in ejectment was delivered to the tenant, laying the demise on the 1st of November, and the tenant on the receipt of this declaration made no objection to the notice to quit, nor set up any right to the possession of the premises, but said he should go out as soon as he could suit himself with another house, it was ruled by Lord *Ellenborough*, C. J., that the defendant's declaration, when served with the ejectment, was evidence to go to the jury, whether the holding was a Michaelmas holding, and the jury found a verdict for the landlord.(*q*) And in a case, where the notice was delivered on September 27, to quit "at the expiration of the term for which you hold the same," which notice was served personally upon the tenant, who observed, "I hope Mr. M. does not mean to turn me out," *Holroyd*, J. permitted the lessor to prove, that it was the general custom, in that part of the county where the demised lands lay, to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively, and direct-

(*n*) *Doe*, d. *Castleton*, v. *Samuel*, 5 Esp. 174.

(*o*) *Doe*, d. *Puddicombe*, v. *Harris*, 1 T. R. 161. *Doe*, d. *Ash*, v. *Calvert*, 2 Campb. 387.

(*p*) *Ante*, 132.

(*q*) *Doe*, d. *Baker*, v. *Wombwell*, 2 Campb. 559.

ed the jury to presume, that this tenancy, like other tenancies in that part of the country, was a tenancy from Lady-day to Lady-day.(*r*)

When the ejectment is brought upon a clause of re-entry for non-payment of rent, if the proceedings are at common law, the lessor must prove the lease or counterpart,(*s*) and that the rent has been demanded with all the formalities mentioned in a preceding chapter.(*t*) If the case falls within the provisions of the statute 4 Geo. II. c. 28. instead of proving a demand of rent, he must show that six months rent is in arrear, and that there is not a sufficient distress upon the premises.(*u*) In order to prove the latter fact, evidence must be given that every part of the premises has been searched; and in a case where a party who was about to make the distress, omitted to enter a cottage upon the premises, the Court considered the search insufficient.(*v*) But where the rent was payable on the 25th of March, with a proviso, that the right of re-entry should accrue, if the rent remained unpaid *by the space of fourteen days next after* it became payable, and the lessor proved that there was no distress upon the premises *some day* in May, (the demise being laid on May 2,) the Court held this to be sufficient *prima facie* evidence to call upon the defendant to show, that there was sufficient distress upon the premises within the terms of the proviso.(*w*)

When the ejectment is for the breach of any other covenant, the lessor must show the covenant broken, by the

(*r*) *Doe*, d. *Milnes*, v. *Lamb*, Nottingham Summer Assizes, 1817—MS.

(*s*) *Roe*, d. *West*, v. *Davis*, 7 East, 363.

(*t*) *Ante*, 149.

(*u*) *Ante*, 150.

(*v*) *Doe*, d. *Powell*, v. *King*, Forrest. 19.

(*w*) *Doe*, d. *Smelt*, v. *Fuchau*, 15 East, 286.

same evidence as in an action of covenant; and if he has been ordered by the Court to give to the tenant particulars of the breaches upon which he means to rely, he will be precluded from giving in evidence different breaches from those contained in the particulars. In a case where the ejectment was upon a proviso for re-entry if the lessee should assign or underlet, it was ruled by Lord *Alvanley*, C. J., that if a person was found in possession, acting and appearing as tenant, it was sufficient *prima facie* evidence of an underletting, to call upon the defendant, (the lessee,) to show in what character such person was upon the premises; and that the declarations of such person were admissible in evidence against the lessee.(*x*)

If the claimant is the assignee of the reversion, after proving the forfeiture, evidence must be given that he was entitled to the reversion at the time the forfeiture was committed,(*y*) and if possible, of the mesne assignments from the original lessor. These mesne assignments, however, will be presumed, if the original lease be for a long term, and the possession of the assignee have continued for a considerable time.(*z*)

When the ejectment is brought for the forfeiture of a mortgage, if the mortgagor is the defendant, the mortgage deeds are the only evidence required, because a man cannot set up any title inconsistent with his own deed. And if the ejectment be against a third person, who holds the mortgaged lands as tenant to the mortgagor, or mortgagee, it will be only necessary in addition to the proof of the mortgage deeds, to give evidence of such tenancy, and either of its

(*x*) *Doe*, d. *Hindley*, v. *Rickarby*, 5 Esp. 4.

(*y*) *Ante*, 74.

(*z*) *Earl*, d. *Godwin*, v. *Baxter*, W. Black. 1228.

regular determination, or of the mortgagor himself having been in possession of the lands at the time of the mortgage, and of the tenancy being unacknowledged by the mortgagee.(*a*) If, however, such third person hold the lands by a title adverse to that of the mortgagor, evidence of the mortgagor's title will of course be required.

When the lord of a manor brings an ejectment for a forfeiture, he must prove that he was lord at the time of the forfeiture committed, and that the person, who is alleged to have committed the forfeiture, has been admitted tenant on the rolls of the manor. Proof of the admittance of the father, and of the descent to the copyholder as son and heir, and payment of quit-rents by him, will not be sufficient evidence: the tenant must be himself admitted, for nothing vests in a copyholder which he can forfeit, before admittance and entry. The act of forfeiture must of course also be proved; but proof is not required of the presentment of the forfeiture, nor of the entry, or seisure, of the lord.(*b*)

When the lord seises the land as forfeited *pro defectu tenentis*, if he seise *absolutely*, he must prove a special custom in the manor entitling him to do so; but if he seise only *quousque*, the custom need not be proved, and an absolute seisure unwarranted by the custom, cannot afterwards be set up as a seisure *quousque*.(*c*) He must also prove, that the regular proclamations have been made, and in one

(*a*) *Keech* v. *Hall*, Doug. 21. *Thunder*, d. *Weaver*, v. *Belcher*, 3 East, 449. *Birch* v. *Wright*, 1 T. R. 378. *Ante*, 106.

(*b*) *Roe*, d. *Jeffreys*, v. *Hicks*, 2 Wils. 13. *Doe*, d. *Foley*, v. *Wilson*, 11 East, 56. B. N. P. 108. *et vide* Walk. Copy. v. i. 324. to 353.

(*c*) Lord *Salisbury's* case, 1 Lev. 63. S. C. 1 Keb. 287. *Doe*, d. *Tarrant*, v. *Hellier*, 3 T. R. 162.

report of Lord *Salisbury's* case, it is said, that the proclamations must be proved by *viva voce* evidence, and that the entry thereof on the Court rolls is not sufficient;(*d*) but no mention is made of this point in another report of the same case,(*e*) nor does it appear in a late similar decision, that any evidence of this nature was required.(*f*)

A lord of a manor cannot maintain ejectment for mines upon his manor, without proof that he has been actually possessed of them within the last twenty years; because they are a distinct possession from the manor, and may be of different inheritances.(*g*) And a verdict in trover, for lead dug out of them, will not be evidence of the possession of the mines; for trover may be brought on property without possession.(*h*)

The doctrine of presumption extends to copyhold lands, and upon proper evidence an enfranchisement of them may be presumed even against the crown.(*i*)

Secondly, Of the evidence on the part of the defendant.

The principle that a claimant in ejectment must recover on the strength of his own title, is now so clearly established that little can be said respecting the evidence necessary on the part of the defendant. The lessor of the plaintiff must always, in the first instance, make out a clear and substantial possessory title to the premises in question; and the defendant's evidence is altogether confined to falsifying

(*d*) 1 Keb. 287.
(*e*) 1 Lev. 63.
(*f*) *Doe*, d. *Tarrant*, v. *Hellier*, 3 T. R. 162.
(*g*) *Rich* v. *Johnson*, Stran. 1142.
(*h*) B. N. P. 102.
(*i*) *Roe*, d. *Johnson*, v. *Ireland*, 11 East, 280.

his adversary's proofs, or rebutting the presumptions which may arise out of them. He needs not show that he has himself any claim whatever to the premises, nor even give evidence of a title in a third person; it is sufficient if he make it appear to the jury, that a legal and possessory title does not subsist in the plaintiff's lessor. Thus, when the lessor claims as heir, he may show a devise by the ancestor to a stranger; that by a particular custom another, and not the claimant, is the heir; that the claimant is a bastard; or any other circumstances which will invalidate his title. In like manner, when the lessor claims as devisee, the defendant may show that the will was obtained by fraud; that it was not duly executed; that the testator was a lunatic;[3] that the lands (if copyhold) had not been properly surrendered; and so forth. And as the same principle holds, whatever be the title of the claimant, any particular directions respecting the defendant's proofs are altogether unnecessary. It is sufficient to observe generally, that the defendant's evidence entirely depends on the nature of the proofs advanced by the plaintiff's lessor, and needs in no case to be extended beyond the rebuttal of them.[4]

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[3] The sanity of a testator is presumed until the contrary appears; but if a mental derangement has been proved, it is then incumbent on the devisee to show a lucid interval at the time of executing the will. *Jackson* v. *Vandeusen*, 5 Johns. 144.

Evidence of an opinion expressed by a devisee, that a testator was not of sound mind, is inadmissible to show his insanity, when other devisees claim under the same will. *Phelps* v. *Hartwell*, 1 Mass. Rep. 71.

The subscribing witnesses to a will may testify as to the opinion they formed of the testator's mind at the time of executing the will. *Poole* v. *Richardson*, 3 Mass. Rep. 330. But other witnesses, whether professional men or others, cannot state their opinions, unless they state particular facts on which their opinions are predicated. *Dickinson* v. *Barber*, 9 Mass. Rep. 225. *Buckminster* v. *Perry*, 4 ibid. 593. *Hathorn* v. *King*, 8 ibid. 371.

[4] Before dismissing the subject of evidence in ejectment, it may be of use to the student to state how far, by our decisions, parol testimony is ad-

CHAPTER XI.

OF THE TRIAL AND SUBSEQUENT PROCEEDINGS.

THE claims of the several parties being prepared for the decision of a jury, by means of the fictions, conditions and

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missible to explain those written instruments which are generally the evidences of title in this action.

Parol evidence is admissible to explain a latent ambiguity, but will not be received to explain a patent ambiguity. *Mann* v. *Mann*, 14 Johns. 1.

Parol evidence is inadmissible to contradict the effect of a deed, or to explain any patent ambiguity, but it may be received to explain latent ambiguities, *ex. gr.* the land and monuments may be located by parol. *Paine* v. *M'Intier*, 1 Mass. Rep. 69. *Revere* v. *Leonard*, ib. 91. *Watson* v. *Boylston*, 5 ib. 411. *Storer* v. *Freeman*, 6 ib. 435. *King* v. *King*, 7 ib. 496. *Albee* v. *Ward*, 8 ib. 83. *Townsend* v. *Wild*, 8 ib. 146.

Parol evidence is inadmissible to show that an execution had been withdrawn, and the levy abandoned, in contradiction to the sheriff's deed. *Jackson* v. *Babcock*, 17 Johns. 167.

Parol evidence is inadmissible to show that a boundary line is incorrectly described in a deed. *Jackson* v. *Bowen*, 1 Caines' Rep. 358.

Evidence of usage cannot be received to explain a deed that is neither ambiguous nor equivocal. *Cortelyou* v. *Van Brundt*, 2 Johns. 357.

But where an *ancient* deed was equivocal, the usage of the parties was admitted to explain it. *Livingston* v. *Ten Broeck*, 16 Johns. 14. *Codman* v. *Winslow*, 10 Mass. Rep. 146.

Parol evidence is inadmissible to show that part of the premises contained in a deed were intended to be excepted. *Jackson* v. *Croy*, 12 Johns. 427.

It cannot be admitted to show that a lease, in the name of one person, was intended for the benefit of another. *Jackson* v. *Foster*, 12 Johns. 490.

Parol evidence was received to show that a patent to *David* Hungerford was intended for *Daniel* Hungerford. *Jackson* v. *Stanley*, 15 Johns. 133.

But in this case, by a subsequent legislative act, *Daniel* Hungerford was declared to be the person intended. *Ibid.*

In *Jackson* v. *Lawton*, (10 Johns. 23.) it was held, that parol evidence could

proofs, described in the preceding chapters, the trial with its incidents, and the subsequent proceedings, will now occupy our attention.[5]

The death of the lessor of the plaintiff, although he be only tenant for life, will not abate the action, nor can it be pleaded *puis darrien continuance*; because the right is supposed to be in his lessee, (the plaintiff,) who may proceed for the damages occasioned by the supposed ouster, although he cannot obtain possession of the land;(*j*) but a trial of

(*j*) *Thrustout*, d. *Turner*, v. *Grey*, Stran. 1056.

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not be given, that a prior patent was issued to A. by mistake, until it was avoided in a regular manner by *scire facias*.

Where a patent has been granted to George *Houseman*, but George *Hosmer* was the grantee intended, this is not such a latent ambiguity as will authorize the admission of parol evidence to explain the patent. (*Thompson*, J., dissenting.) *Jackson* v. *Hart*, 12 Johns. 77.

A deed, purporting to be an absolute conveyance, cannot be avoided by *parol* evidence of usury, or of any trust or condition not expressed in such deed. *Flint* v. *Sheldon*, 13 Mass. Rep. 443.

The courts of Massachusetts have ruled, that parol evidence is admissible to aid the construction of a conveyance, so far as to prove the state of facts existing at the time of the conveyance. *Leland* v. *Stone*, 10 Mass. Rep. 459. *Fowle* v. *Bigelow*, 10 Mass. Rep. 379.

The declarations of a grantee cannot be admitted to show that land, included in a conveyance, was not so intended by the parties. *Paine* v. *M'Intier*, 1 Mass. Rep. 69.

[5] The Court has no power to compel the defendant to consent to a survey of the premises in his possession. *Jackson* v. *Hogeboom*, 9 Johns. 83.

But where plaintiff refuses to permit a survey to be made, the Court will stay proceedings, or the judge at the circuit will postpone the trial until he does consent. *Jackson* v. *Murphy*, 3 Caines' Rep. 82.

To supersede the necessity of a view, it seems the Supreme Judicial Court of Massachusetts have adopted the practice of having a plan taken under rule of court, by a sworn surveyor and chain-bearers, who are to give notice to the parties of the execution of their trust. *Gerrish* v. *Bearce*, 11 Mass. Rep. 193.

this nature is unknown in practice, for the damages in ejectment are only nominal, and if the plaintiff be nonsuited from the refusal of the defendant to appear at the trial, the executor of the lessor will not be entitled to his costs, for the consent rule is merely personal.(*k*)

When the defendant refuses at the trial to confess lease, entry, and ouster, the plaintiff must be called and nonsuited, and the cause of the nonsuit specially indorsed upon the *postea;* and the lessor of the plaintiff will then be entitled to have judgment entered against the casual ejector.(*l*) With respect, however, to the time of entering this judgment, a considerable difference prevails between the practice of the Court of King's Bench, and of the Common Pleas: the judgment being signed, and the execution taken out, in the latter court, immediately after the entering of the nonsuit, and, in the former, not until the day in bank when the *postea* is returned.(*m*)

It is to be regretted that two of the superior courts of the kingdom should differ upon a point so essential to the regular administration of justice; but it is not easy to decide which is the more eligible mode of proceeding. By the practice of the Court of Common Pleas, a more early possession is given to the plaintiff (in some cases of nearly four months;) and this seems a just punishment upon the defendant, for refusing to perform his previous promise; whilst, on the other hand, it is said by the Court of King's Bench, that the defendant may possibly have some good reason for not confessing, as, for example, want of due no-

(*k*) *Thrustout* v. *Bedwell*, 2 Wils. 7.
(*l*) *Turner* v. *Barnaby*, Salk. 259. Appen. No. 33.
(*m*) *Doe*, d. *Palmerston*, v. *Copeland*, et *Throgmorton*, d. *Fairfax*, v. *Bentley*, 2 T. R. 779.

tice of trial, and that it is but fair he should have an opportunity of assigning such reason to the Court.

If the defendant refuse to appear, the proceedings are the same whether he be tenant or landlord; and the motion for judgment against the casual ejector, on a nonsuit for want of appearance, is absolute in the first instance.(*n*)

If there be several defendants, and some of them refuse to appear and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, endorsing upon the *postea*, that such verdict is entered for them, because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector for the lands in their possession.(*o*)

If there be any material variance between the issue and the record, it seems that the defendant should nevertheless appear at the trial, and afterwards move the Court to set aside the verdict for the variance; because if he do not appear, he is out of court, and cannot afterwards properly move to set aside the nonsuit; yet, upon a motion of this nature, the Court did, in one case, grant the rule upon payment of costs,(*p*) and in another case staid the proceedings.(*q*)

(*n*) *Styles*, d. *Redhead*, v. *Oakes*, Barn. 182. *Fenn*, d. *Rickattson*, v. *Marriott*, Barn. 185.

(*o*) *Claxmore* v. *Searle*, Ld. Raym. 729 B. N. P. 98. Formerly, if some of the defendants did not appear, the plaintiff was nonsuited as to all; because *all* the defendants not admitting *the demise*, he could not maintain his declaration. The present practice was adopted in the reign of William III. (*Haddock's* case, 1 Vent. 355.) *Fagg* v. *Roberts*, 2 Vent. 195

(*p*) *Jones*, d. *Thomas*, v. *Hengest*, Barn. 175.

(*q*) *Law* v. *Wallis*, 1 Barn. 156.

In a case where the demise was laid on a day not come at the time of the trial, the defendant was notwithstanding obliged to confess, as the plaintiff would otherwise have been nonsuited, and have been entitled to judgment against the casual ejector.(*r*)[6]

If the property litigated be of great value, and difficulties are likely to arise in the course of the trial, the Court will grant a trial at bar; and the motion for this purpose may be made by either party. But the mere value of the premises,(*s*) or the probability of a protracted trial, will not be sufficient to induce the Court to grant the application; *difficulty* must concur; and, therefore, the motion must be supported by an affidavit, stating "the value *per annum* of the estate; that many witnesses are to be produced on each side; that the title of the lessor of the plaintiff will depend, as the case may be, on an intricate course of descent, or the legal operation of deeds; that various points of law, and other questions, will necessarily arise at the trial; and that the cause, therefore, should be tried at the bar of the Court, by a special jury of the county where the estate lies, if the Court shall so think fit, and not before any one judge of assize."

(*r*) *Anon.* Ld. Raym. 728. *et Small, d. Baker, v. Cole*, Burr. 1159.

(*s*) *Lord Sandwich's* case, Salk. 648.

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[6] In ejectment brought on the forfeiture of a lease, the Court will compel the plaintiff to deliver a bill of particulars of the breaches of the covenant on which he intends to rely. So, if the plaintiff declare generally in ejectment, and the defendant have any doubt what lands the plaintiff means to proceed for, he may call upon him by a judge's order to specify them. And, on the other hand, the plaintiff may call on the defendant to specify for what he defends, when that is not ascertained by the consent rule. *Doe* v. *Hull*, 7 Term Rep. 332. n. (*a.*) Tidd's Pract. Vol. I. 535.

It has been said, that the rule is not to allow a trial at bar in ejectment, unless the value of the lands be a hundred pounds *per annum*;(*t*) and in some authorities it is laid down, that it is not sufficient to swear generally, that the cause is expected to be difficult, but that the particular difficulty, which is expected to arise, ought to be pointed out, to enable the Court to judge whether it be sufficient.(*u*) And, in a recent case, the Court refused a trial at bar, on the mere allegation of length, and probable questions of difficulty in a cause respecting a pedigree.(*v*)

In other actions, a rule for a trial at bar is never granted before issue joined; but as the issue in ejectment is very seldom joined until after the end of term, when it would be too late to make the application, the motion in this action may be granted even before appearance.(*w*)

As the granting of a trial at bar is a *favour* conferred upon the applicant, the courts exercise the power of annexing equitable conditions to their grant. Thus, where, on an application made by the defendant for a trial at bar, it appeared, on showing cause against the rule, that the lessor of the plaintiff was unable to bear the expense, and that one of his witnesses was above eighty years of age, who might die before a trial at bar could be had. The Court granted the application, but said, that as it was a favour asked by the defendant, they would lay him under terms, that if he succeeded, he should only have *nisi prius* costs, but if the lessor of the plaintiff were to succeed *he* should have bar costs, and that the old witness should be examined

(*t*) *Goodright* v. *Wood*, 1 Barn. 141.

(*u*) *Rex* v. *Burgesses of Caermarthen*, Say, 79. 2 Lil. P. R. 740. *Goodright* v. *Wood*, 1 Barn. 141.

(*v*) Tidd, 768.

(*w*) *Roe*, d. *Cholmondley*, v. *Doe*, Barn. 455.

on interrogatories, and her deposition read, if she should die before the trial. It was also, by consent, made part of the rule, that the cause should be tried by a Middlesex jury, instead of one from Norfolk, where the premises were situated.(*x*) And, in another case, where the lessor of the plaintiff had had a rule for a trial at bar, but having laid the demise by a wrong person, had discontinued the action, and brought a new ejectment; the Court would not grant him a second rule for a trial at bar until he had paid the costs of the former ejectment.(*y*)

After verdict, the successful party is, of course, entitled to the judgment of the Court; but the same time is allowed to the other party to move for a new trial, or an arrest of judgment, in ejectment, as in other actions.[7]

The courts will seldom grant a new trial in ejectment, when the verdict is given for the defendant, because all parties remaining in the situation they were, previously to the commencement of the action, the claimant may bring a second ejectment without subjecting himself to additional difficulties; but this principle does not apply when the verdict is given against the defendant. The possession is then changed. The defendant in the first ejectment becomes the plaintiff's lessor in the second, and is obliged to give evidence of his own title, instead of merely rebutting the claim set up by his opponent; and as this is a point

(*x*) *Holmes*, d. *Brown*, v. *Brown*, Doug. 437.

(*y*) Lord *Coningsby's* case, Stran. 548.

[7] The Supreme Court of Pennsylvania have ruled, that two verdicts the same way in ejectment are no bar to a new trial, where there is ground to apprehend that the jury have erred, and that the statute of limitations would defeat a new suit. *Lessee of Mitchell* v. *Mitchell*, 4 Bin. 180.

of material consequence to him, "the courts (to use Lord *Mansfield's* words) rather lean to new trials on behalf of defendants in case of ejectments, especially on the footing of surprise."(*z*)

Of the Judgment.

By the judgment in ejectment, the plaintiff's lessor obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had. If, therefore, he have a freehold interest in them, he is in as a freeholder; if he have a chattel interest, he is in as a termor; and if he have no title at all, he is in as a trespasser, and liable to account for the profits to the legal owner, without any re-entry on his part;(*a*) the verdict in the ejectment being no evidence in a subsequent action, even between the same parties.(*b*) Since, however, the claimant has a mere *possession* given to him by the judgment, it may be asked how he can become *seised* according to his title, if he have more than a chattel interest in the land. This is effected by another fiction. It is a rule of law, that when a man, having a title to an estate, comes into possession of it by lawful means, he shall be in possession according to his title; and, therefore, when *possession* is once given by the sheriff, the possession and title are said to unite, and the plaintiff's lessor holds the lands according to the nature of his interest in them.

As the judgment is grounded on the verdict, it ought not to be entered up for more land, or for different parcels, than the defendant was found guilty of by the verdict, though a

(*z*) *Clymer* v. *Littler*, 1 W. Blk. 345. 348.

(*a*) *Taylor*, d. *Atkins*, v. *Horde*, Burr. 60. 90. 114.

(*b*) *Clerke* v. *Rowell*, 1 Mod. 10.

variance between the verdict and judgment, occasioned by the misprision, or default, of the clerk in entering the judgment, is not fatal, but may be amended by the Court, even after a writ of error brought.(*c*)

The Courts, indeed, after judgment, make every possible intendment in favor of the claimant; and if the title declared on can by any means be supposed to exist, consistently with the judgment, such judgment will be supported. Thus, where two demises were laid, by different lessors, of the same premises for the same term, both as to commencement and duration, and the judgment was, that the plaintiff recover his *terms* in the premises; and it was objected, that both lessors could not have a title to demise the whole: and that, therefore, there was an inconsistency in the judgment, and that it did not appear which of the lessors' rights was established; the Court affirmed the judgment; because, after a verdict, a bare possibility of title consistent with the judgment is sufficient, and the two lessors might have been joint tenants, and yet refuse to join in a lease.(*d*) In like manner, where the declaration contained two distinct demises, by two different lessors, of two distinct undivided thirds, and judgment was given, that the plaintiff "*do recover his said terms*," and on error it appeared, (from the facts stated in a bill of exceptions to the judge's directions on a point of law,) that the ejectment respected only one undivided third, the judgment was held well enough, when the point was only raised on a bill of exceptions, and *semble* that it would have been well even on a special verdict.(*e*) Upon the same principle, when in an ejectment on two se-

(*c*) *Mason* v. *Fox*, Cro. Jac. 631. Appendix, No 34.

(*d*) *Morres* v. *Barry*, Stran. 1180. *Ante*, 187.

(*e*) *Rowe*, d. *Boyce*, v. *Power*, 2 N R. 1. 35.

veral demises of two separate parcels of lands, the judgment was entered, that the plaintiff do recover his *term*, and an objection was taken, that it should have said, that the plaintiff do recover his *terms*; the Court said they would extend the word *term* to his *term* in *A.*, and his *term* in *B.*, and affirmed the judgment.(*f*) And where the ejectment was upon two demises, by different lessors, and the second demise was, "of *the aforesaid* premises," and judgment was entered for the plaintiff as to the first demise, and the defendant as to the other; and it was objected, that from not stating the second demise to be of "*other premises*," the judgments were contrary to each other, inasmuch as the defendant was put without day, as to the same premises for which the plaintiff recovered, the Court affirmed the judgment, and construed *the aforesaid premises which the second lessor demised* to mean the term in the premises.(*g*) So, also, where the plaintiff in ejectment declared upon two demises of several lands, by several parties, but laid only one *habendum*, namely, *habendum tenementa prædicta*, so demised by the aforesaid several parties, for seven years, and it was assigned for error, that the declaration was ill for want of another *habendum;* for that the verdict was general, and it was uncertain to which demise the single *habendum* related, the Court held, that *reddendo singula singulis*, it was well enough.(*h*) Where, also, the declaration was for lands, and common of pasture generally, without stating the common to be appendant, or appurtenant, it was intended after verdict, on a writ of error, to be such common as ejectment could be maintained for.(*i*) And where the ejectment was for one messuage, or tenement, and four acres of land to

(*f*) *Worrall* v. *Bent*, Stran. 835.
(*g*) *Fisher* v. *Hughes*, Stran. 908.
(*h*) *Slabourne* v. *Bengo*, 1 Ld. Raym. 561. *Moore* v. *Fursden*, 2 Vent. 214. S. C. Carth. 224. S. C. Comb. 190.
(*i*) *Newman* v. *Holdmyfast*, Stran. 54. *Ante*, 17.

the same belonging, the words "to the same belonging" were held to be void; for land cannot properly belong to a house, and then it is a declaration of a messuage or tenement, and four acres of land, which, though it be void for the tenement, is good for the *land*; for which the plaintiff upon releasing the damages, had judgment.(*j*)

Upon a similar principle, where the plaintiff, in the *first* year of his present majesty's reign, declared upon a demise made in the *thirty-third* year of his present majesty, the Court held, that it was well enough after verdict; because it was only a title defectively set out, and there could be no doubt but that a proper title was proved at the trial.(*k*)

If the plaintiff obtain a verdict for the whole premises demanded, the entry of the judgment is, that the plaintiff recover his term against the defendant, of and in the premises aforesaid, or that he recover possession of the term aforesaid. And this form is also used where a moiety, or other part, of the whole premises is recovered; as, for example, when the plaintiff declares for forty acres in *A.*, and recovers only twenty; and it is at the lessor's peril that he take out execution for no more than he has proved title to. But where the verdict is for some parcels and not for

(*j*) *Wood* v. *Payne*, Cro. Eliz. 186. In an old case, where the plaintiff declared on a lease of a house, ten acres of land, twenty acres of meadow, and twenty acres of pasture, by the name of "a house and ten acres of meadow, be the same more or less," and had a verdict, the judgment was arrested; because the declaration was so uncertain and repugnant, that even the verdict could not help it, the land mentioned in the declaration being so different from that mentioned in the pernomen. (*Anon.* Yelv. 166.) But *quære*, if such a verdict would not now be good for the ten acres?

(*k*) *Small*, d. *Esker*, v. *Cole*, Burr. 1159.

all, or part of all, as where the plaintiff declares for lands in *A.*, and lands in *B.*, and the defendant is found guilty in *A.* only, the judgment(*l*) is, that the plaintiff recover his term in *A.*; and as to the other part, whereof the jury acquitted the defendant, that the plaintiff be in mercy, and that the defendant go thereof without day.(*m*)

If the defendant be acquitted of part, and judgment be entered, *quod defendens sit quietus quoad*, that part whereof he is acquitted, this is error; for the judgment in this action is not final, as in a writ of right; nor does it protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action.(*n*)

If a sole defendant die after the commencement of the assizes and before verdict, or after verdict and before judgment, it will not abate the suit; nor can his death be alleged for error, provided the judgment be entered within two terms after the verdict.(*o*)

When there are several defendants, and one of them dies at any time before judgment, the lessor may proceed against the survivors, upon suggesting the death(*p*) of such defendant upon the plea roll: the suggestion need not also be entered upon the *nisi prius* roll; for it is sufficient if it there appear to the judge, what he is to try, and between whom;

(*l*) As an ejectment is an action of trespass *vi et armis*, the judgment before the statute of 5 and 6 W. & M. c. 12. used to run *quod defendens capiatur*; but, since that statute, such entry is no longer necessary. (*Linsey v. Clerk*, Carth. 390. S. C. 5 Mod. 285.)

(*m*) Judgment Book, 72, 73.

(*n*) *Taylor v. Wilbore*, Cro. Eliz. 768.

(*o*) 17 Car. II. c. 8.

(*p*) 8 and 9 Will. III. c. 11. s. 7.

nor need the judgment say, *quod quærens nil capiat per breve* against the dead defendant.(*q*)[8]

If one of several defendants die before verdict, it is the better way to suggest his death on the roll before the trial, and to award a *venire* to try the issue against the surviving defendants;(*q*) although where in such case the *venire* was awarded against all, upon suggesting the death of the one upon the roll after the verdict, the plaintiff had judgment for the whole against the others.(*r*) But if the lessor proceed to trial, and obtain judgment against all the defendants, without such suggestion, it is error, because there can be no verdict, or judgment, against a person not in being.(*s*)

The entry of the judgment, notwithstanding the death of one of several defendants, ought to be general, that the plaintiff recover his term in the premises against the survi-

(*q*) *Far* v. *Denn*, Burr. 362.
(*r*) *Gree* v *Rolle*, Ld. Raym. 716.
(*s*) Gilb. Eject. 98.

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[8] In ejectment, where defendants sever in pleading, and enter into separate consent rules, the notices and pleadings must continue to be entitled against all, but each party must be served with a notice. *Jackson* v. *Cooper*, 1 Caines' Rep. 19.

Where several defendants plead jointly, plaintiff is bound to prove a joint possession; and if it appear that two of the defendants held in severalty, and the others jointly, plaintiff can have judgment only against those holding jointly, and the defendants holding in severalty will be entitled to judgment, for otherwise those holding in severalty would be liable for the mesne profits of the whole. *Jackson* v. *Hazen*, 2 Johns. 438.

In a subsequent case, however, (*Jackson* v. *Woods*, 5 Johns. 281.) *Kent*, C J., says, "perhaps the doctrine in *Jackson* v. *Hazen*, was pressed too far," and decided, that in ejectment against five defendants, where the jury found them separately guilty, as to the part separately occupied by each of them, the plaintiff was entitled to judgment against all the defendants severally, according to the verdict.

vors;(*t*) but execution must not be taken out for more than the plaintiff has a right to recover.

It seems, that if the defendants make a joint defence for the whole land demanded, and one of them die, execution may be given of the whole, because the whole interest comes by survivorship to the others, and therefore the plaintiff hath still persons before the court to defend the whole; but that where each of the defendants makes a defence for part only, the plaintiff, upon the death of one of them, must not take out execution for the part in his possession, because they are in the nature of distinct defendants, and consequently, as to that part which was defended by the person deceased, there is no person in court against whom judgment can be given, or execution taken out.(*u*)

If an ejectment be brought against baron and *feme*, and the plaintiff have a verdict against *both*, but, before judgment, the husband dies, the plaintiff, on suggesting his death, may have judgment against the wife; because (having been found guilty of the trespass) she must have obtained the unlawful possession *jointly* with her husband, or have had the whole possession in her own right; and in either case, the possession is wholly in her on the death of her husband.(*v*)

Of the Costs.

When the action is undefended, and judgment is entered against the casual ejector, the only remedy which the lessor of the plaintiff has for his costs, is an action for mesne pro-

(*t*) *Far* v. *Denn*, 1 Burr. 362.
(*u*) Gilb. Eject. 98.
(*v*) *Rigley* v. *Lee*, Cro. Jac. 356. *Lee* v. *Rowkeley*, 1 Roll. 14.

fits, in which, at the discretion of the jury, they are recoverable as consequential damages.

When the party interested appears and enters into the consent rule, and afterwards at the trial refuses to confess, he is liable, upon such consent rule, to the payment of costs, and an attachment may be issued against him if he refuse or neglect to pay them ;(*w*) but no writ of *fieri facias*, or *capias ad satisfaciendum*, will in this case lie, because the judgment in the ejectment is against the casual ejector.(*x*)

When there are several defendants, some of whom appear at the trial and confess, but others do not appear, and a verdict is found against those who do appear, each defendant is liable for the whole costs, and the plaintiff's lessor may tax them all against any one or all of the defendants at the same time; that is to say, upon the postea against those who appear, and upon the consent rule against those who do not appear; and if after satisfaction from one defendant for the costs, he take out execution against another, the Court will interfere to prevent it. But it seems he cannot separate the costs, and tax part of them against one defendant, and part against another.(*y*)

If the lessor of the plaintiff die before the commission-day of the assizes, and the plaintiff be nonsuited by reason of the defendant's refusal to confess, the lessor's representative cannot recover any costs; because the consent rule is merely personal, and does not extend to the representative :(*z*) but where the plaintiff's lessor died after the trial, the defendant was compelled by the Court to pay to his

(*w*) *Turner* v. *Barnaby*, 1 Salk. 259

(*x*) *Goodright* v. *Vice*, Barn. 182.

(*y*) *Thrustout*, d. *Wilson*, v. *Foot*, B. N. P. 335. S. C. Barn. 149.

(*z*) *Thrustout* v. *Bedwell*, 2 Wils. 7.

representative the costs, which had been taxed *by consent* upon the consent rule.(*a*)

When the tenant appears, and there is a verdict and judgment against him, execution may be taken out thereon for the costs, as in ordinary cases; and the lessor of the plaintiff may have a *capias ad satisfaciendum*, or a *fieri facias*, for the costs, and an *habere facias possessionem* for the possession, separately, or in one writ at his pleasure.(*b*)

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife for the costs.(*c*)

When the landlord is made defendant without the tenant, the judgment to recover the possession is against the casual ejector; but, nevertheless, as there is a judgment in existence against the landlord, execution may be taken out thereon for the costs.(*d*)

It may be collected from the case of *Gulliver* v. *Drinkwater*,(*e*) that, independently of these remedies, the lessor may, in all cases, recover the amount of his taxed costs(*f*) in an action for mesne profits; but that the Court will not interfere to assist him, if the jury do not include such costs in their damages, when the lessor might have proceeded for them in a different manner.

(*a*) *Goodright* v. *Holton*, Barn. 119. *Post*, 321.

(*b*) Appendix, No. 36, 37, 38, 39, 40.

(*c*) *Doe*, d. *Taggart*, v. *Butcher*, 3 M. & S. 557.—Appendix, No. 42.

(*d*) Appendix, No. 35.

(*e*) 2 T. R. 261.

(*f*) *Doe* v. *Davis*, 1 Esp. 358.

When the proceedings are in the Court of King's Bench, and a verdict is found for the defendant, or the plaintiff is nonsuited for any other cause than the defendant's not confessing lease, &c. the defendant must tax his costs on the *postea*, as in other actions, and sue out a *capias ad satisfaciendum*, or *fieri facias*, for the same against the plaintiff; and if, upon showing this writ under seal to the lessor, serving him with a copy of the consent rule, and demanding the costs, the lessor do not pay them, the Court will, on an affidavit of the facts, grant an attachment against him.(*g*)[9]

When the proceedings are in the Court of Common Pleas, it is the practice in such case, for the prothonotary to tax the costs upon the *postea*, and mark them upon the consent rule. This rule is then shown to the plaintiff's lessor, and at the same time the costs are demanded of him by the defendant personally, or by his attorney named in the rule; and, upon affidavit of such demand, and of the lessor's refusal to pay the costs, an attachment may be obtained.(*h*)[1]

(*g*) *Tily* v. *Baily*, M. 6 Geo. II.

(*h*) Imp. C. B. 5 Ed. 654. In a recent case in the Common Pleas, in which the parties had pursued the practice of the Court of King's Bench, *Mansfield*, C. J. expressed a hope that nothing so absurd as a *capias ad satisfaciendum* against the nominal plaintiff, would ever again be heard of. *Doe*, d. *Prior*, v. *Salter*, 3 Taunt. 485.

[9] If a person be let in to defend on payment of costs, and after entering into the consent rule keep out of the way to avoid being served with a copy of the *ca. sa.* against the casual ejector, a rule will be granted to show cause why an attachment should not go against him, and that service of the rule at the defendant's house shall be sufficient. *Jackson* v. *Stiles*, 2 Caines' Rep. 368.

[1] On application for attachment for costs, for not confessing lease, entry, and ouster, the affidavit must show an authority to demand them given by the lessor. *Jackson* v. *Stiles*, 3 Caines', 140.

When there are several defendants and one or more of them is, or are, acquitted by the verdict, he, she, or they, will, by the provisions of statute 8 & 9 W. and M. c. 11. be entitled to costs, unless the judge shall certify in open court, that there was good cause for making such person or persons defendant or defendants.(*i*)

When the lessor of the plaintiff is a peer, no attachment will be granted against his person; but the Court will grant a rule to show cause, why an attachment, as to his goods and chattels, should not be issued, and, if necessary, will make that rule absolute.(*j*)

If the lessor of the plaintiff die after issue joined and before trial, or even after trial and before payment of costs, the defendant cannot recover his costs against the representative, the consent rule being, (as already mentioned,) merely personal; and it seems immaterial, whether the defendant's claim arises from a verdict in his favor, or from the plaintiff's being nonsuited upon the merits.(*k*)

In a case where baron and *feme* were lessors in ejectment, and the baron died after entering into the rule, the *feme* was held liable to the payment of the costs; because they were to be paid by the lessors of the plaintiff, and both of them were in the lease.(*l*)

Where the lessor of the plaintiff was an infant, and his

(*i*) The provisions of this statute seem scarcely applicable to the present mode of conducting ejectments, for how can it be said, that he who was made a defendant at his own request, was made so without good cause!

(*j*) *Thornby* v. *Fleetwood*, Cas. Pr. C. P. 7.

(*k*) *Thrustout* v. *Bedwell*, 2 Wils. 7. *Doe*, d. *Linlot*, v. *Ford*, 2 Smith, 407.

(*l*) *Morgan* v. *Stapely*, 1 Keb. 827.

lessee was nonsuited, and 50*l.* costs were given to the defendant, and the infant's father, who prosecuted the suit, was dead, the Court made a rule, that the lessor should pay the costs; yet, says the book, it was doubted in this case, because of his infancy; but if the father had been alive, the Court would have made him pay the costs, or, if he had left assets, his executor. The question was adjourned.(*m*)[2]

If the lessor of the plaintiff abandon the action after the appearance of the tenant, or landlord, and refuse to join in the consent rule, he is held not liable for the defendant's costs, upon the principle, that until he has put his signature to the rule, he has not consented to proceed against the new defendant.(*n*)

If the lessor of the plaintiff sue *in forma pauperis*, he will be dispaupered in case of vexatious delay; but it does not seem, that the Court will also compel him to pay the defendant's costs.(*o*)

When there are several defendants, the lessor of the plaintiff has his election to pay costs to which defendant he pleases.(*p*)

OF THE EXECUTION.

When the lessor of the plaintiff prevails, he may enter

(*m*) *Anon.* 1 Freem. 373.
(*n*) *Smith* v. *Barnardiston*, W. Blk. 904.
(*o*) *Doe*, d. *Leppingwell*, v. *Trussell*, 6 East, 505.
(*p*) *Jordan* v. *Harper*, Stran. 516.

[2] It is too late after trial to move that the infant lessors of the plaintiff file security for costs. *Jackson* v. *Bushnell*, 13 Johns. 330.

peaceably upon the premises recovered, without any writ of execution, because the land recovered is certain ;(*q*) but it is more prudent to sue out the regular writ, as the assistance of the sheriff may be necessary to preserve the peace.[3]

The writ of execution in an ejectment is called the writ of *habere facias possessionem*, and answers to the *habere facias seisinam* in real actions: for as in the one case, the freehold being recovered, the sheriff is ordered to give the demandant *seisin* of the lands in question, so also in the other case, the *possession* being recovered, the sheriff is commanded to give execution of the *possession*.(*r*)

When the landlord is admitted to defend the action, and the judgment is entered against the casual ejector, with a stay of execution until further order, the lessor, before he takes out execution, must move the Court for leave to do so; and if he sue out a writ of possession without such motion, the execution will be set aside for irregularity.(*s*) The rule, however, for this purpose is absolute in the first instance.(*t*)

If the lessor of the plaintiff be devested of his right of possession between the time when his demise is laid, and the time of issuing execution, it seems that the Court will prevent him from issuing a writ of *habere facias possessionem*, or set one aside, if issued.(*u*)

(*q*) *Taylor*, d. *Atkins*, v. *Horde*, Burr. 60. 88. *Anon.* 2 Sid. 155. 6.

(*r*) Appendix, Nos. 36 to 40.

(*s*) *Goodright*, d. *Rowell*, v *Vice*, Barn 182. Appendix, No. 35.

(*t*) *Fenn*, d. *Rickattson*, v. *Marriott*, Barn. 185.

(*u*) *Doe*, d. *Morgan*, v. *Bluck*, 3 Camp. 447.

[3] After judgment lessor may enter without a *habere fac. poss.*, and is protected from trespass between parties and privies, but he must enter before the expiration of the demise. *Jackson* v. *Haviland*, 13 Johns. 229.

In other cases, the execution follows, of course, upon the judgment.

The writ of possession is drawn up in general terms, commanding the sheriff to give to the plaintiff, "the possession of his term, of and in the premises recovered in the ejectment;" but without any particular specification of the lands whereof he is to make execution; and as the description of the premises, in the demise in the declaration, is also too general to serve as a direction to the sheriff, it is the practice, for the lessor of the plaintiff, at his own peril, to point out to the sheriff the premises whereof he is to give him possession; and if the lessor take more than he has recovered in the action, the courts will interfere in a summary manner, and compel him to make restitution.(*v*)

They will, also, if circumstances require, interfere before the execution of the writ, and restrain the lessor from taking possession of more than he is entitled to. As, where the lessor had declared for lands held under two separate titles, and by a mistake of the judge upon the law of the case, the verdict was given for the plaintiff upon both titles, when it ought to have been entered for the defendant as to the lands comprised in one of them; the Court, after argument, granted a rule to confine the execution to those lands only, to which the lessor had a valid title.(*w*)[4]

(*v*) *Roe*, d. *Saul*, v. *Dawson*, 3 Wils. 49. *Ante*, 21.

(*w*) *Doe*, d. *Forster*, v. *Wandlass*, 7 T. R. 118, *in notis*. *Et vide Brooke*, d. *Mence*, v. *Baldwin*, Barn. 468.

[4] Where the jury gives a general verdict for the plaintiff in ejectment, but he shows title to only a moiety of the premises, the Court will order him to take possession of the moiety only. *Jackson* v. *Van Bergen*, 1 Johns. Cas. 101.

The sheriff, it seems, previously to the execution of the writ, may demand an indemnity from the plaintiff;(*x*) and when he has to deliver possession of any particular number of acres, he must estimate them according to the custom of the country in which the lands are situated.(*y*)

The possession to be given by the sheriff, is a full and actual possession, and he is armed with all power necessary to this end. Thus, if the recovery be of a house, and he be denied entrance, he may justify breaking open the door, for the writ cannot otherwise be executed. (*z*

If the lessor recover several messuages in the possession of different persons, the sheriff must go to each of the several houses, and severally deliver possession thereof, (which is done by turning out the tenants;) for the delivery of the possession of one messuage, in the name of all, is not a good execution of the writ; since the possession of one tenant is not the possession of the other.(*a*) But when the several messuages are in the possession of one tenant only, it is sufficient if he give possession of one messuage in the name of all.(*b*)

When the recovery is of land, the same distinction seems to prevail; that is to say, if there be only one tenant, a delivery of any part, in the name of the whole, will be sufficient; but if there be more than one, a separate delivery of the lands in the possession of each tenant respectively must be made.(*a*)

If the officers be disturbed in the execution of the writ,

(*x*) Gilb. Eject. 110.
(*y*) Roll. Ab. 886. H. 4.
(*z*) *Semayne's* case, 5 Co. 91. (*b.*)
(*a*) 1 Roll. Ab. 886. H. 2.
(*b*) *Floyd* v. *Bethill*, 1 Roll. Rep. 420.

the Court will, on affidavit of the circumstances, grant an attachment against the party, whether he be the defendant, or a stranger :(c) and the writ is not understood to be completely executed, until the sheriff and his officers are gone, and the plaintiff is left in quiet possession.

In an old case where the sheriff returned, that in the execution of the writ, he removed all the persons, whom upon diligent search he could find on the premises, and gave peaceable possession to the plaintiff, and that, immediately after he was gone, three men, who were secretly lodged in the house, expelled the plaintiff, upon notice of which he returned to the house to put the plaintiff in full possession, but met with such resistance that he could not do it, but at the peril of his life ; the Court held, that the same was no execution, and awarded a new writ.(d)

In the old authorities we find it laid down, that if the lessor, after having had possession given to him by the sheriff, and before the writ of possession has been returned and filed, be again ousted by the defendant, he shall have a new writ of possession, or an attachment ; but that if he be ousted by a stranger, he shall be driven to another ejectment ; and the reason assigned for this distinction is, that in the one case the defendant shall never, by his own act, keep the possession which the plaintiff has recovered from him by due course of law, and in the other that, as the title was never tried between the plaintiff and the stranger, he may claim the land under a title paramount to that of the plaintiff, and therefore the recovery and execution in the former action ought not to hinder the stranger from keeping that possession to which he may have a right. It is also said, that the

(c) *Kingsdale* v. *Mann*, 6 Mod. 27. (d) *Upton* v. *Wells*, 1 Leon. 145. S. C. Salk. 321.

return of the writ of the execution is so much in the power of the plaintiff, that the Court will not, at the instance of the defendant, direct it to be returned; for the return is left to the discretion of the plaintiff, that he may do what is most for his own advantage, in order to have the benefit of his judgment; the best way to effect which is, to permit him to renew the execution at his pleasure, until full execution be obtained.(*e*)

All these cases, however, seem to be overruled by a recent decision of the Court of Common Pleas. The lessor of the plaintiff had been put into possession by virtue of a writ of *habere facias possessionem*, on the 22d day of February, 1806, which writ had never been returned by the sheriff; and on the 10th day of October, 1807, whilst he continued in possession, the person, against whom he had recovered the premises, entered into the house by force, and resisted with violence all attempts to regain the possession. Upon these grounds, a new writ of *habere facias* was moved for, and the case of *Radcliff* v. *Tate*,(*f*) was cited: but "the Court denied the authority of that case, and held, that possession having been given under the first writ, the sheriff ought to have returned, 'that he had given possession,' and that the plaintiff could not afterwards have had another writ: an *alias* cannot issue after a writ is executed. If it could, the plaintiff, by omitting to call on the sheriff to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass which the same tenant might commit with-

(*e*) *Rex* v. *Harris*, Ld Raym. 482. *Molineux* v. *Fulgam*, Palm. 289. *Ratcliff* v. *Tate*, 1 Keb. 776. *Loveless* v. *Ratcliff*, 1 Keb. 785. *Devereux* v. *Underhill*, 2 Keb. 245. *Fortune* v. *Johnson*, Styl. 318. *Pierson* v. *Tavenor*, 1 Roll. Rep. 353. *Davies*, d. *Povey*, v. *Doe*, W. Blk. 892. *Anon.* 2 Brown, 253. *Kingsdale* v. *Mann*, 6 Mod. 27. S. C. Salk. 321. *Goodright* v. *Hart*, Stran. 321.

(*f*) 1 Keb. 779.

in twenty years next after the date of the judgment;"(*g*) and the rule was refused.

If the lessor neglect to sue out his writ of possession for a year and a day after judgment, he must revive the judgment by *scire facias*, as in other cases; and when the judgment is against the casual ejector, the ter-tenant must be joined in the writ.(*h*)

When a sole defendant in ejectment dies after judgment, and before execution, it has been doubted whether a *scire facias* is necessary, because the execution is of the land only, and no new person is charged;(*i*) but the surer method is, notwithstanding, to sue out a *scire facias*. And as a *scire facias* for the land must issue against the ter-tenant, whoever he may be, it will be also necessary to sue out another *scire facias* for the costs against the personal representative, unless he be himself the ter-tenant.(*j*)

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife for the costs.(*j*)

If the lessor of the plaintiff die after the *teste* of the writ, but before it is actually sued out, it is not necessary to revive the judgment by *scire facias*; and as he is not a party on the record, it seems no *scire facias* would be necessary,

(*g*) *Doe* v. *Roe*, 1 Taunt. 55.

(*h*) *Withers* v. *Harris*, Lord Raym. 806.—Appendix, No. 42.

(*i*) *Per Holt*, C. J. *Withers* v. *Harris*, Ld. Raym. 806. *Sed vide Proctor* v. *Johnson*, 2 Salk. 600. S. C. Ld. Raym. 669.

(*j*) *Doe*, d. *Taggart*, v. *Butcher*, 3 M. & S. 557.

if he died before the *teste* of the *habere facias possessionem*, although the case of *Doe*, d. *Beyer* v. *Roe*,(*k*) has certainly left this point somewhat doubtful.[5]

Of the Writ of Error.

A writ of error in ejectment cannot he brought in the name of the casual ejector,(*l*) and consequently it will not lie until after verdict; for, before appearance, the casual ejector is the only defendant in the suit, and, after appearance, the new defendant is bound by the terms of the consent rule to plead the general issue.(*m*) If also the defendant refuse at the trial to confess, &c. he will be precluded from bringing error, because the plaintiff will then be nonsuited as to him, and the judgment will be entered against the casual ejector.(*m*)

When indeed the landlord defends alone, and the verdict is found against him, error may be brought, notwithstanding that the judgment, upon which the execution is-

(*k*) Burr. 1970.
(*l*) *Roe*, d. *Humphreys*, v. *Doe*, *Ante*, chap. VI. Barn. 181. This principle is of course limited to the modern practice.
(*m*) *Ante*, 232.

[5] If the defendant alleges that the lessor has taken possession of more land than was recovered by the verdict, a writ of restitution will be ordered; but if lessor deny the allegation, he will be allowed a feigned issue to try the fact. *Jackson* v. *Hasbrouck*, 5 Johns. 366. 5 Burr. 2673.

On setting aside default against casual ejector, and a writ of possession thereon, the Court will, on payment of costs, order a writ of restitution. *Jackson* v. *Stiles*, 1 Caines' Rep. 503.

No tenant, who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession, to which he is not party. *Ex parte Reynolds*, 1 Caines' Rep. 500.

And if a tenant, whose possession is distinct from that for which the action was brought, be turned out, he may have a writ of restitution. *Ibid.*

sues, is entered against the casual ejector ;(*m*) for a judgment is also in existence against the landlord, and upon that judgment the writ of error may be taken out in the landlord's name. To enable him, however, to proceed with the writ of error, he must show the error brought, as cause against the plaintiff's rule for taking out execution against the casual ejector ;(*n*) and if he omit to do this, and suffer a regular execution to take place, the Court will not, on a subsequent motion, order the execution to be set aside.(*o*)

By statutes 16 and 17 Car. II. c. 8. s. 3 and 4. it is enacted, that no execution shall be staid by writ of error, upon any judgment after verdict in ejectment, unless the plaintiff in error shall become bound in a reasonable sum to pay the plaintiff in ejectment all such costs, damages, and sums of money, as shall be awarded to such plaintiff, upon judgment being affirmed, or on a nonsuit, or discontinuance had ; and, in case of affirmance, discontinuance, or nonsuit, the Court may issue a writ to inquire, as well of the mesne profits, as of the damages by any waste committed after the first judgment ; and are upon the return thereof to give judgment, and award execution for the same, and also for costs of suit.[6]

The words of this statute seem to render it necessary for the plaintiff in error to be *personally* bound ; but by a reasonable construction, it is held sufficient, if he procure

(*m*) *Ante*, 234.
(*n*) *Ante*, 305.
(*o*) *George*, d. *Bradley*, v. *Wisdom*, Burr. 756.

[6] The statute of New-York (1 Rev. Laws, 143.) is similar in its provisions to this. The statute also provides, that no writ of error shall issue to remove a judgment out of the Supreme Court, without the certificate of a counsellor in said court, that in his opinion there is error in substance in the proceedings.

proper sureties to enter into the recognisance of bail, for otherwise lessors residing in distant counties would sustain great inconvenience, and an infant lessor, or a lessor becoming a *feme covert* after action brought, would be entirely excluded from the benefit of the act.(*p*) But, although the sureties may be examined as to their sufficiency, the plaintiff in error cannot, and, therefore, where the lessor of the plaintiff swore, that the defendant was insolvent, and also that he (the lessor) had a mortgage upon the land for more than it was worth, the Court still held, that the defendant's recognisance was sufficient to entitle him to his writ of error.(*q*)

The reasonable sum, in which the plaintiff in error is bound under this statute, is generally double the improved rent of the premises in dispute, and the single costs of the ejectment.(*q*)

The writ of error does not operate as a stay of execution until bail is put in, which cannot be done until the plaintiff's lessor has taxed his costs, for until costs are taxed, the amount of the penalty of the recognisance of the bail in error cannot be fixed; and if the lessor choose to waive his taxation of costs, and proceed for his possession only, the Court will not interfere to prevent him, notwithstanding the allowance of the writ of error.(*r*)

In the case of *Wharod* v. *Smart*,(*s*) the defendant brought a writ of error in parliament, and the Court compelled him

(*p*) *Barnes* v. *Bulmer*, Carth. 121. *Lushington* v. *Dose*, 7 Mod. 304. *Keene*, d. Lord *Byron*, v. *Deardon*, 8 East, 298.

(*q*) *Thomas* v. *Goodtitle*, Burr. 2501. *Keene*, d. Lord *Byron*, v. *Deardon*, 8 East, 298.

(*r*) *Doe*, d. *Messiter*, v. *Dinely*, 4 Taunt. 289.

(*s*) Burr. 1823.

to enter into a rule "not to commit waste or destruction during the pendency of the writ of error."

When the plaintiff's lessor proceeds against the bail by action on the recognisance, they are not chargeable with the mesne profits under stat. 16 and 17 Car. II. c. 1. s. 4., unless their amount has been first ascertained by writ of inquiry pursuant to the provisions therein contained.(*t*)

After a recovery in ejectment, the lessor of the plaintiff may peaceably enter, pending a writ of error, if he find the premises vacant; but he cannot enter by force, nor take out a writ of execution.(*u*)

Of bringing a second Ejectment.

We have now traced the proceedings in this action, from the commencement to the conclusion; and it only remains to add a few remarks respecting the bringing of a new, or second ejectment.

It has already been observed, that a judgment in ejectment confers no title upon the party in whose favour it is given; and that it is not evidence in a subsequent action, even between the same parties.(*v*) From these circumstances it is manifest, that the judgment can never be final: and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action. The structure of the record also renders it impossible to plead a former recovery in bar of a second ejectment: for the plaintiff in the suit is only a fictitious person, and as the

(*t*) *Doe* v. *Reynolds*, 1 M. & S. 247. Recog. in *Withers* v. *Harris*, Ld.
(*u*) *Badger* v. *Floyd*, 12 Mod. 398. Raym, 806. 8.
(*v*) *Ante*, 192.

demise, term, &c. may be laid many different ways, it never can be made appear that the second ejectment is brought upon the same title as the first.

It is said by Mr. Sergeant *Sellon*, in his Practice of the Courts,(*w*) "that it has sometimes been attempted in Chancery, after three or four ejectments, by a *bill of peace* to establish the prevailing party's title; yet it hath always been denied, for every *termor* may have an ejectment, and every ejectment supposes a new demise, and the *costs* in ejectment are a recompense for the trouble and expense to which the possessor is put. But that where the suit begins in Chancery, for relief touching pretended incumbrances on the title of lands, and the Court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the Court, the Court hath ordered a *perpetual injunction* against the defendant, because there the suit is first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent, and inequitable against the possession, it is within the compass of the Court to relieve against it." It should seem, however, from the cases of *Barefoot* v. *Fry*,(*x*) and *Leighton* v. *Leighton*,(*y*) that courts of equity will sometimes interfere, and grant perpetual injunctions, when the ejectments have been commenced in the usual way at the common law. And in one case, where upon a most vexatious prosecution of ejectments, the Court of Chancery refused to grant a perpetual injunction, upon an appeal to the House of Lords, the injunction was allowed.(*z*)

(*w*) 2 Sell. Prac. 144.
(*x*) Bunb. 158.
(*y*) 1 P. Wms. 671.
(*z*) *Earl of Bath* v. *Sherwin*, Bro. Cas. Parl. 270.

CHAPTER XII.

OF STAYING THE PROCEEDINGS IN THE ACTION OF EJECTMENT.

THE discretionary power exercised by the Courts in the regulation of ejectments, is frequently called forth by applications from the defendant, to stay the proceedings in the action; and a separate consideration of the cases in which these applications have been granted, seems preferable to intermixing them with the detail of the regular practice.

When the ejectment is brought on the forfeiture of a lease, the proceedings will be staid upon the application of the tenant, until the lessor of the plaintiff has delivered particulars of the breaches of covenant, on which he intends to rely; and a summons for this purpose will be granted before the tenant has appeared to the action, or entered into the consent rule.

When the lessor of the plaintiff is an infant, the Court will stay the proceedings until security be given for the costs, unless a responsible person has been made the plaintiff in the suit, or the father, or guardian, undertake to pay them: but an inquiry into these facts should be made pre-

viously to the application.(*a*) The proceedings will also be staid until security be given for the costs, when the lessor resides abroad ;(*b*) and, in a case where an ejectment was brought upon the demise of a person resident in Ireland, the Court of King's Bench staid the proceedings until security should be given for the costs ; although it was an ejectment brought under the direction of the Court of Chancery, where the bill was retained until after the trial of the ejectment, and security had already been given there to the amount of 40*l.*(*c*) In like manner, if the plaintiff's lessor should die pending the action, it seems that the Court, although they cannot stay the proceedings *in toto*, will not suffer the suit to proceed, unless security be given for the costs.(*d*) And when the lessor is unknown to the defendant, the latter may demand an account of his residence, or place of abode, from the lessor's attorney, and if he refuse to give it, or give a fictitious account of a person who cannot be found, proceedings will be staid until security for the costs be given.(*e*) But these are the utmost limits to which the Courts will go in granting rules of this nature ; and an application has been refused, founded on the poverty of the lessor,(*f*) and also one in which it appeared that an ejectment had previously been brought in another Court and abandoned, and that the lessor had been obliged to give security in the first ejectment, because his residence was then unknown.(*g*) The practice of granting these rules originated in the Court of King's Bench, and

(*a*) *Noke* v. *Windham*, Stran. 694. *Throgmorton*, d. *Miller*, v. *Smith*, Stran. 932. *Anon.* 1 Wils. 130. *Anon.* 1 Cowp. 128. Appendix, No. 43.

(*b*) B. N. P. 111. Appendix, No. 44.

(*c*) *Denn*, d. *Lucas*, v. *Fulford*, Burr. 1177.

(*d*) *Thrustout*, d. *Turner*, v. *Grey*, Stran. 1056. *Ante*, 246.

(*e*) *Tidd's* Prac. 476, 7.

(*f*) *Goodright*, d. *Jones*, v. *Thrustout*, Cas. Pr. C. P. 15.

(*g*) *Doe*, d. *Selby*, v. *Alston*, 1 T. R. 491.

were, indeed, at first, entirely confined to cases of infant lessors,(*h*)

The proper time to take out a summons, or move the Court for this rule, is after plea pleaded.(*i*)

The next case in which the Courts interfere to stay the proceedings, is when the costs of a prior ejectment upon the same title, or between the same parties, are left unpaid.(*j*)

For some time after the introduction of this practice, the Court would not interfere unless the two ejectments were brought in the same Court;(*k*) but this limitation no longer prevails, and it is now immaterial in what court the first ejectment is brought.(*l*) Formerly, also, there was a diversity of opinion, whether the proceedings could be staid where the two ejectments were brought (without fraud, or collusion,) upon different demises, although upon the same title;(*m*) but it is now of no consequence whether the two ejectments are brought, upon the demise of the same or different persons, against all or some of the same parties, or for the same or different premises, provided they are brought upon the same title, and for the recovery of part of the same estate. Thus, proceedings have been staid where one of the lessors of the plaintiff in the first action died before the commencement of the second; where in

(*h*) *Thrustout*, d. *Dunham*, v. *Perceival*, Barn. 183.

(*i*) 2 Sell. Prac. 139.

(*j*) Append. No. 45.

(*k*) *Austine* v. *Hood*, 1 Sid. 279. *Tredway* v. *Harbert*, Comb. 106.

(*l*) *Doe*, d. *Hamilton*, v. *Atherly*, 7 Mod. 420. *Anon.* 1 Salk. 255. *Holdfast*, d. *Hattersley*, v. *Jackson*, Barn. 133. *Doe*, d. *Chadwick*, v. *Law*, W. Blk. 1158. *Doe*, d. *Walker*, v. *Stephenson*, 3 B. & P. 22.

(*m*) *Short* v. *King*, Stran. 681. *Tredway* v. *Harbert*, Comb. 106.

the second ejectment two trustees were added to the lessors; where part of the lands were occupied by new tenants; where the second action was between the heir of the plaintiff's lessor, and the heir of the defendant in the first action.(*m*) And in a case, where the second ejectment was brought by the lessee of an insolvent debtor, who had been the lessor of the plaintiff in the first action, and it appeared that the assignment was fraudulent to evade the payment of the costs, the Court (without entering into the point whether, in a fair case, the assignee of an insolvent debtor shall be called upon for former costs, before he be suffered to bring a new ejectment on the title of his principal,) made the rule absolute to stay the proceedings until the costs of the first action were paid.(*n*)

A distinction was also formerly taken as to the situation of the parties in the different actions, and it was holden, that if the defendant in the second ejectment had been the plaintiff's lessor in the first, the proceedings should not be staid:(*o*) but this doctrine is now also exploded, and the change of situation in the parties is immaterial.(*p*) The rule will also be granted, whether the merits be decided in the former action, or whether a judgment of nonsuit, or of *non-pros*, be given; nor is the length of time which elapses between the two actions any bar to the rule; for many good reasons may exist for such delay, as the poverty of the other party, or a wish to end the controversy.(*q*)

(*m*) *Doe*, d. *Hamilton*, v. *Hatherly*, Stran. 1152. *Thrustoul*, d. *Williams*, v. *Holdfast*, 6 T. R. 223. *Keene*, d. *Angel*, v. *Angel*, 6 T. R. 740. *Doe*, d. *Feldon*, v. *Roe*, 8 T. R. 645.

(*n*) *Doe*, d. *Chadwick*, v. *Law*, W. Blk. 1180.

(*o*) *Roberts* v. *Cook*, 4 Mod. 379.

(*p*) *Thrustout*, d. *Williams*, v. *Holdfast*, 6 T. R. 223.

(*q*) *Dence* v. *Doble*, Comb. 110. *Keene*, d. *Angel*, v. *Angel*, 6 T. R. 740. *Anon.* Salk. 256.

The Courts will likewise stay the proceedings in a second ejectment until the costs of a former one be paid, if the conduct of the party, against whom the application is made, has been vexatious or oppressive, although he is not liable to the costs of the first action. Thus, where the lessor of the plaintiff in the second action was also the lessor in the first, and had refused, after the appearance of the defendant in such first action, to enter into the consent rule, whereby, although nonsuited for want of a replication, he was exempted from the costs of the defendant's appearance, the Court would not let him proceed in the second ejectment until he had satisfied the defendant for the expenses of such first appearance.(*r*) And, upon the same principle, where the first ejectment was on the demise of the husband and wife, but the husband alone entered into the consent rule, and judgment was given therein in the Common Pleas for the defendant, (which judgment was afterwards affirmed in the King's Bench and the House of Lords,) and after the death of the husband, the wife brought a second ejectment on her own demise; the Court would not suffer her to proceed until the costs of the first ejectment were paid, saying, "We are not going to compel the lessor to pay the costs, but only to prevent her being vexatious."(*s*)

It was once, indeed, holden, that the proceedings in a second ejectment ought not *in any case* to be staid for nonpayment of the costs in the first action, if costs were not of right payable to the party applying;(*t*) and that it was *in all cases* necessary to show, that the party against whom

(*r*) *Smith*, d. *Ginger*, v. *Barnardiston*, W. Blk. 904.

(*s*) *Doe*, d. *Williams*, v. *Hatherly*, Stran. 1152.

(*t*) *Thrustout*, d. *Parke*, v. *Troublesome*, Stran. 1099. S. C. And. 297.

the application was made, had acted vexatiously, or oppressively, before the rule could be obtained. But these maxims have long given place to more just and liberal principles.(*u*)

In a late case, the Court ordered the proceedings in a second ejectment to be staid until the costs of an action for mesne profits, (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of error,) as well as the costs of the first ejectment, were paid.(*v*) But the Court will not extend the rule to include the damages recovered in such action for mesne profits, however vexatious the proceedings of the party may have been.(*w*)

The Courts will not stay the proceedings in the second action, where the party against whom the application is made, is already in custody under an attachment for non-payment of the costs of the first action.(*x*)

There is no particular stage of the proceedings at which it is necessary to move the Court, or take out a summons for this rule. It will be granted even before the defendant has appeared: and it always should be moved for as early in the action as it conveniently can be. Where, however, satisfactory reasons were given to the Court, why the application was not made at an earlier stage of the suit, the Court ordered the proceedings to be stayed until the costs of a former ejectment were paid, after a notice of trial had been given, and the lessor of the plaintiff had been at the

(*u*) *Short* v. *King*, Stran. 681.

(*v*) *Doe*, d. *Pinchard*, v. *Roe*, 4 East, 585.

(*w*) *Doe*, d. *Church*, v. *Barclay*, 15 East, 233.

(*x*) *Benn*, d. *Mortimer*, v. *Denn*, Barn. 180.

expence of bringing his witnesses to the place of trial.(*y*) The reasons assigned to the Court were, that the cause was so clear at the last trial, and the parties had delayed so long commencing their second action, (four years,) that the defendants did not think them in earnest until notice of trial was given, and that the defendant then proceeded to tax his costs, in order to ground the application, which otherwise he would not have done, the lessor of the plaintiff being insolvent.

The Courts will also stay proceedings in an ejectment when the lessor of the plaintiff has two actions depending, at the same time, for the same premises, in different courts; and the proceedings in the one action will then be staid until the other action is determined.(*z*) And in a case, where the claimant brought thirty-seven separate ejectments for thirty-seven different houses, all of which depended on the same title, the Court said it was a scandalous proceeding, staid the proceedings in thirty-six of them, and made a rule that they should abide the event of the thirty-seventh.(*a*)

When the party, against whom a verdict in ejectment has been obtained, brings a writ of error, and pending that writ, commences a second ejectment, the Court will order the proceedings in the second action to be stayed until the writ of error is determined; and it seems, also, that if it do not appear to the Court, that the writ of error was brought with some other view than to keep off the payment of costs, proceedings will be stayed until the costs of the first action are

(*y*) *Doe* v. *Law*, W. Blk. 1158.
(*z*) *Thrustout*, d. *Parke*, v. *Troublesome*, And. 297. S. C. Stran. 1099.
(*a*) 2 Sell. Prac. 144. *Ante*, 236.

paid, notwithstanding such costs are suspended by the writ of error.(*b*)

By the statute 7 Geo. II. c. 20. s. 1. it is enacted, "that when an ejectment is brought by a mortgagee, his heirs, &c. for the recovery of the possession of the mortgaged premises, and no suit is depending in any court of equity, for the foreclosing or redeeming of such mortgaged premises, if the person having a right to redeem, having been made the defendant in the action, shall at any time, pending the suit, pay to the mortgagee, or in case of his refusal, bring into court, all the principal moneys, and interest due on the mortgage, and also costs to be computed by the Court, or proper officer appointed for that purpose; the same shall be deemed and taken to be a full satisfaction and discharge of the mortgage, and the Court shall discharge the mortgagor of and from the same accordingly." By the third section, the act is not to extend to any case where the person, against whom the redemption is prayed, shall insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage, or are admitted by the other side, nor to any case where the right of redemption in any cause, or suit, shall be controverted or questioned, by or between different defendants in the same cause, or suit.

An application for a rule to stay proceedings under this statute,(*c*) must of course be made before execution executed, and must be accompanied by an affidavit that no suit in equity is depending. The party should also appear to the action before the application is made, for the Courts

(*b*) *Fenwick* v. *Grosvenor*, 1 Salk. 258. *Grumble* v *Bodily*, Stran. 554.

(*c*) Append. No. 46.

have no power to interfere under the statute until after appearance. But where the premises were in possession of a tenant of the mortgagor, who neglected to appear to the action, in consequence of which the mortgagee recovered possession of the premises under a judgment by default against the casual ejector, the Court of Common Pleas (if the other party had not consented to take what was due upon the mortgage, and restore the possession) would have set the judgment and execution aside, in order to let the mortgagor in as defendant, and place him in a condition to apply to the Court to stay the proceedings on the terms of the statute.(*d*)

In a case in the Court of King's Bench, where a mortgagee made a will, leaving all his property to executors upon certain trusts, and died, and his will was disputed by his heir in the Prerogative Court, but by the sentence of that court established, and letters testamentary in consequence granted to the executors; after which grant the heir appealed to the Court of Delegates against the sentence of the Prerogative Court, pending which appeal the executors assigned the mortgage to the lessor of the plaintiff, who also, pending the appeal, brought an ejectment against the mortgagor for the recovery of the mortgaged premises, to which ejectment the mortgagor did not appear, but suffered judgment to go by default against the casual ejector. Upon an application on the part of the mortgagor (accompanied by an affidavit of the facts) to stay the execution until the determination of the appeal, upon the ground, that the title of the lessor would be invalidated, provided the appeal were given in favour of the heir, and that the defendant might then perhaps be compelled to pay the mortgage

(*d*) *Doe*, d. *Tubb*, v. *Roe*, 4 Taunt. 887.

money twice, the Court made the following order: "That the execution obtained by the lessor of the plaintiff, in this action of ejectment, be stayed until such time as the appeal, now pending before the Court of Delegates, be determined, upon the defendant vesting the mortgage money, interest, and costs, to be taxed by the Master, in Exchequer bills, and depositing such Exchequer bills in the hands of the signer of the writs in this court."(*e*)

A rule upon this statute has been granted after an agreement, on the part of the mortgagor, to convey the equity of redemption to the mortgagee, where no tender of a deed of conveyance for execution had been made to the defendant, or bill in equity filed;(*f*) but where it appeared that, subsequently to the defendant's agreement, several applications had been made to him, but without effect, to complete the purchase, the Court refused to stay the proceedings.(*g*)

In a case where, upon an application by the mortgagor to stay proceedings under this statute, it appeared that he had also taken up money from the mortgagee upon his bond, the Court granted the rule upon the payment of the mortgage and interest only, the bond debt not being a lien upon the lands; but it seems, that when in such case *the heir* is bound by the bond, and the mortgagor dies, the heir must discharge the bond debt, as well as the mortgage.(*h*) Where, however, the bond was *a lien on the estate*, and the mortgagee had given notice to the mortgagor, that he should in-

(*e*) *Doe*, d. *Mayhew*, v. *Erlam*, MS. M. T. 1811. The court did not in this case advert to the circumstance that the mortgagor, who made the application, had not appeared to the action.

(*f*) *Skinner* v. *Stacey*, 1 Wils. 80.

(*g*) *Goodtitle*, d. *Taysum*, v. *Pope*, 7 T. R. 185.

(*h*) *Bingham*, d. *Lane*, v. *Gregg*, Barn. 182. *Archer*, d. *Hankey*, v. *Snapp*, And. 341. S. C. Stran. 1107, *and the cases there cited.*

sist upon payment of the money due upon it, the Court refused to stay the proceedings, upon payment of the mortgage money only.(*i*) Where also other mortgages, although upon different premises, existed between the defendant and the plaintiff's lessor, the Court would not stay proceedings under this statute, upon the payment of the sum due upon one of the mortgages only.(*j*)

If, upon a motion of this nature, any doubt exist as to the amount of what is due between the parties, the Court of King's Bench will refer the case to the master, and the Court of Common Pleas to the prothonotary, whose respective duty it is to tax the costs; and in a case where an affidavit was made, that the mortgagee had been at great expense in necessary repairs of part of the premises in his possession, (the ejectment being brought for the residue,) and it was prayed, that the prothonotary might be directed to make allowance for such repairs; the Court said, that the rule must follow the words of the statute, and that the prothonotary would make just allowances and deductions.(*k*) If, however, after taxation, the debt and costs are not paid, the lessor must proceed in the suit, and cannot have an attachment.(*l*)

The cases in which the Courts have stayed the proceedings under stat. 4 Geo. II. c. 28. have already been considered.(*m*)

(*i*) *Felton* v. *Ash*, Barn. 177. It is not stated in the report of the case, from what circumstance the bond became a lien on the estate.

(*j*) *Roe*, d. *Kaye*, v. *Soley*, W. Blk. 726. It does not appear from the report of this case, that the other mortgaged premises were included in the ejectment; but it is difficult to reconcile the decision either to the letter or spirit of the statute, unless they were also contained in the declaration.

(*k*) *Goodright* v. *Moore*, Barn. 176.

(*l*) *Hand* v. *Direly*, Stran. 1220.

(*m*) *Ante*, 156, &c. Append. No. 47.

CHAPTER XIII.

OF THE ACTION FOR MESNE PROFITS.

WHILST the action of ejectment remained in its original state, and the ancient practice prevailed, the measure of the damages given by the jury, when the plaintiff recovered his term, were the profits of the land accruing during the *tortious* holding of the defendant. But upon the introduction of the modern system, an alteration took place in this particular; and as the proceedings are now altogether fictitious, the damages assessed are only nominal, and do not include the real injury sustained by the claimant from the loss of his possession. When, therefore, this alteration took place, it became necessary to give another remedy to the lessor for these damages; and this was effected by a new application of the common action of trespass *vi et armis*, generally termed *an action for mesne profits*:(*n*) in which action, the plaintiff complains of his ejection and loss of possession, states the time during which the defendant (the real tenant) held the lands and took the rents and profits, and prays judgment for the damages which he has thereby sustained.

It has been said, that a lessor in ejectment may, if he

(*n*) Reev. E. L. 4 vol. 169.

please, waive the trespass, and recover the mesne profits in an action for use and occupation ;(*o*) but this election must be limited to the profits accruing antecedently to the time of the demise in the ejectment ; for the action for use and occupation is founded on *contract*, the action of ejectment upon *wrong*, and they are, therefore, wholly inconsistent with each other when applied to the same period of time ; since in the one action the plaintiff treats the defendant as a *tenant*, and in the other as a *trespasser*.(*p*) When, however, a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt upon the 4 Geo. II. c. 28. against the tenant, for double the yearly value of the premises during the time the tenant so holds over: for the double value is given by way of penalty, and not as rent.(*q*)

The action for mesne profits may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages, and to sign his judgment ; but the Court will stay execution until the writ of error is determined.(*r*)

The action is bailable or not, at the discretion of the court, or judge, and when an order for bail is made, the recognisance is usually taken in two years value of the premises, but this is also discretionary.(*s*)

(*o*) *Goodtitle* v. *North*, Doug. 584. *Doe*, d. *Cheney*, v. *Batten*, Cowp 243.

(*p*) *Birch* v. *Wright*, 1 T R. 378.

(*q*) *Timmings* v. *Rowlison*, Burr. 1603 It is not yet settled whether, when the ejectment is founded upon a notice to quit given by the tenant, the landlord is entitled to maintain debt upon the 11 Geo. II. c. 19 for double rent, but it seems the better opinion that he is not. *Ante*, 143.

(*r*) *Harris* v. *Allen*, Cas. Prac. C. P. 46. *Donford* v. *Ellis*, 12 Mod. 138.

(*s*) *Hunt* v. *Hudson*, Barn. 86. 1 Sell. Prac. 86.

The lessor of the plaintiff in the antecedent action of ejectment, is of course the person concerned in interest, but he may bring his action for mesne profits either in his own name, or that of his nominal lessee.(*t*) The former, however, is the more advantageous method; as he may then, upon proper proofs, recover damages for the rents and profits received by the defendant, anterior to the time of the demise in the ejectment, which cannot be done in an action at the suit of the nominal plaintiff,(*u*) and the courts will not stay the proceedings until security be given for the costs, which will be done when the action for mesne profits is brought in the name of such nominal lessee.(*v*)

It was once, indeed, doubted whether this action could be maintained in the name of the plaintiff in the ejectment, after a judgment by default against the casual ejector, because, being a possessory action, an entry must be either proved or admitted, neither of which, it was argued, could in such case be done; but it is now settled, that there is no distinction between a judgment in ejectment upon a verdict and one by default, the right of the claimant being in the one case tried and determined, and in the other confessed.(*w*)

A tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his companion.(*x*)

(*t*) It may here be incidentally observed, that when the ancient practice is resorted to, and the plaintiff in the ejectment is a real person, the court will not permit him to release the action for mesne profits, should the lessor bring it in his name. (*Close's* case, Skin. 247. Anon. Salk. 260.)

(*u*) B. N. P. 87.

(*v*) Say. Costs. 126.

(*w*) *Aslin* v. *Packer*, Burr. 665. *Jeffries* v. *Dyson*, Stran. 960.

(*x*) *Goodtitle* v. *Tombs*, 3 Wils. 118. *Cutling* v. *Derby*, W. Black. 1077.

As the action for mesne profits is an action of trespass, it cannot be maintained against executors or administrators, for the profits accruing during the lifetime of the testator or intestate ; nor will a court of equity interfere to enforce the payment of them against personal representatives, when the lessor has been deprived of his legal remedy by the mere accident of the defendant's death. But, where the lessor was delayed from recovering in ejectment by a rule of the court of law, and by an injunction at the instance of the defendant, who ultimately failed both at law and in equity, the Court decreed an account of the mesne profits against his (the defendant's) executors.(*y*)

It is also doubtful, whether the action can be maintained against a tenant for the holding over of his undertenants, for it should be brought against the person in actual possession and trespassing.(*z*) But any person so found in possession, after a recovery in ejectment, is liable to the action: and it is no defence to say that he was upon the premises as the agent, and under the license of the defendant in ejectment, for no man can license another to do an illegal act. But the measure of the damages in such case will not be the whole mesne profits of the lands, but will depend upon the time such person has had them in his occupation, together with the other circumstances of the case.(*a*)

In the case of *Keech*, d. *Warne*, v. *Hall*,(*b*) where it was decided that a mortgagee might recover in ejectment, without a previous notice to quit, against a tenant claiming

(*y*) *Pulteney* v. *Warren*, 6 Ves. J. 73

(*z*) *Burne* v. *Richardson*, 4 Taunt. 720.

(*a*) *Girdlestone* v. *Porter*, K. B M. T. 39 Geo. III. Wood. L. and T. 511.

(*b*) Doug. 21.

under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee, it was asked by the counsel for the defendant, if such mortgagee might also maintain an action against the tenant for mesne profits, which would be a manifest hardship and injustice to the tenant, as he would then pay the rent twice. Lord Mansfield, C. J. gave no opinion on that point; but said, there might be a distinction, for the mortgagor might be considered as receiving the rent in order to pay the interest, by an implied authority from the mortgagee, until he determined his will.(*c*)

The declaration in the action for mesne profits must expressly state the different parcels of land from which the profits arose, or the defendant may plead the common bar. It should also state the time when the defendant broke and entered the premises and ejected the plaintiff, the length of time during which he so ejected him, and the value of the mesne profits of which he deprived him; and a declaration which does not contain these statements will be holden ill on special demurrer: but the defect is cured by verdict, or after judgment by default and writ of inquiry executed, by the operation of the stat. 4 Ann. c. 16.(*d*)

In the statement of the damages in the declaration the costs of the ejectment may be included, whether the judgment be against the casual ejector, or against the tenant or landlord; and when the judgment is against the casual ejector for want of an appearance, the costs are invariably included in the statement of the damages, though it ap-

(*c*) *Et vide* 4 Ann. c. 16. s. 10.

(*d*) *Higgins* v. *Highfield*, 13 East, 407.

pears more prudent, for reasons already assigned in other cases, to omit them.(*e*)

The general issue is *not guilty;* and if the plaintiff declare against the defendant, for having taken the mesne profits for a longer period than six years before action brought, the defendant may plead the statute of limitations, namely, *not guilty within six years* before the commencement of the suit, and thereby protect himself from all but six years.(*f*) Bankruptcy is no plea in bar to this action, for the plaintiff does not demand the value of the land only, but the whole damages sustained by the tort; and as the damages are uncertain, they cannot be proved under a commission of bankruptcy, but must be ascertained by a jury under all the circumstances of the case.(*g*) The stat. of 49 Geo. III. c. 121. s. 9. which directs, that all persons *who shall have given credit* upon good and valuable consideration *bona fide*, for any money whatsoever, which is not due at the time of the bankruptcy, shall be admitted to prove such debts, &c. has been holden not to extend to damages recoverable in an action for mesne profits.(*h*)

As, also, this action is for a *tortious* occupation, the defendant cannot pay money into Court.(*i*)

It was formerly holden, that if the action for mesne profits were brought in the name of the claimant in the ejectment, or after a judgment by default against the casual ejector, the defendant was at liberty to controvert the plaintiff's title; because the plaintiff in the action for mesne

(*e*) *Gulliver* v. *Drinkwater*, 2 T. R. 261. *Doe* v. *Davies*, 1 Esp. 358, *et vide Utterson* v. *Vernon*, 3 T. R. 539. 47. *Ante*, 302.

(*f*) B. N. P. 88.

(*g*) *Goodtitle* v. *North*, Doug. 584.

(*h*) *Moggridge* v. *Davis*, 1 Whit. 16.

(*i*) *Holdfast* v. *Morris*, 2 Wils. 115.

profits, in the one case, and the defendant in the other, were not parties to the record in the previous ejectment, and, therefore, no estoppel could arise either against, or in favor of either of them, by such record.(*j*) But it is now settled, that after every recovery in ejectment, the tenant is estopped from controverting the title of the plaintiff in a subsequent action for mesne profits, provided the plaintiff proceed only for the profits accruing subsequently to the time of the ouster in the ejectment. If, however, he seek to recover profits antecedent to the demise therein, or bring his action against a precedent occupier, the record in the ejectment cannot be given in evidence, but the plaintiff must prove his title to the premises, from whence the profits arose, to entitle him to receive them.(*k*)

He must, also, in such case, prove an entry upon the lands, though some doubt seems to exist as to what proof of entry will be sufficient. By some it has been said, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession, and that, therefore, if a man make his will and die, the devisee will not be entitled to the profits until he has made an actual entry, or, in other words, until the day of the demise in the ejectment; for that none can have an action for mesne profits unless in case of actual entry and possession. Others have holden, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say that if the law were not so, the Courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they

(*j*) 1 Lill. Prac Reg. 676. *Jeffries v. Dyson*, Stran. 960.

(*k*) Bull. N. P. 87. *Aislin* v. *Parkin*, Burr. 665. S. C. Barn. 472.

now do, and by that means entitle themselves to recover profits, to which they would not otherwise be entitled.(*l*) The latter seems the better opinion; but these antecedent profits are now seldom the object of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues.(*m*) It should, however, be observed, that when a fine with proclamations has been levied, an entry to avoid it will not, in this action, entitle the plaintiff to the profits between the time of the fine levied, and the time of the entry, although they probably may be recovered in a court of equity.(*n*)

It has already been observed, that the defendant in this action is estopped from controverting the title of the plaintiff from the day of the demise in the ejectment;[7] when,

(*l*) *Metcalf* v. *Harvey*, 1 Ves. 248, 9.—B. N. P 87.

(*m*) *Ante*, 189.

(*n*) *Dormer* v. *Fortescue*, 3 Atk. 124. *Compere* v. *Hicks*, 7 T. R. 727.

[7] A recovery of nominal damages is no bar to an action for the mesne profits, and it is unnecessary to enter a *remittitur damna*. *Van Alen* v. *Rogers*, 1 Johns. Cas. 281.

The plaintiff is entitled to mesne profits from the time of the demise laid in his declaration in ejectment. *Ibid.* But if plaintiff goes for the mesne profits *before* the day of the demise, defendant may controvert his title. 2 Burr. 667, 668.

If the tenant has made improvements, he will not be allowed them in an ejectment by a devisee, but must resort to the representatives of the devisor. *Van Alen* v. *Rogers*, 1 Johns. Cas. 281.

An action for mesne profits is an equitable action, and will allow of every kind of equitable defence, and *it seems* that repairs may be liquidated in this action. *Murray* v. *Gouverneur*, 2 Johns. Cas. 438.

The right to mesne profits is a necessary consequence of a recovery in ejectment, and the defendant cannot set up a title in bar; and even where the defendant had, after the verdict in ejectment, brought ejectment for the same premises, and had obtained a verdict, he was not permitted to set up this second verdict as a bar to the action for mesne profits. *Benson* v. *Matsdorf*, 2 Johns. 369.

And in the case of *Duffield* v. *Stiles*, (2 Dallas, 156.) where plaintiff, after

therefore, the plaintiff seeks to recover only such profits as have accrued subsequently to such demise, no other evidence of his title is required, than examined copies of the judgment in ejectment, of the writ of possession and of the sheriff's return thereon ;(*o*) and if the plaintiff has been let into possession of the premises by the defendant, an examined copy of the judgment in ejectment only will be sufficient.(*p*) It has, indeed, been doubted, whether evidence of the writ of possession and sheriff's return is ever necessary, except upon judgment by default against the casual ejector, but it is, notwithstanding, prudent to be prepared with it in all cases, unless the plaintiff has been let into possession by the defendant.(*q*)

(*o*) *Astlin* v. *Parkin*, B. N P. 87.

(*p*) *Calvert* v. *Horsfall*, 4 Esp. 67.

(*q*) *Vide Thorp* v. *Fry*, B. N. P. 87, *et* S. N P. 693. (n. 50.) *et Aislin* v. *Parkin*, Burr. 665. The reason assigned for this distinction is, that where the judgment is had against the tenant in possession, the defendant, by entering into the consent rule, is estopped both as to the lessor and lessee, so that either may maintain trespass without an actual entry, but that where the judgment is had against the casual ejector, no rule having been entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed. But this reasoning is not satisfactory ; for if the tenant be concluded by the judgment in the ejectment from controverting the plaintiff's title, it should seem he is also concluded from controverting his possession, for possession is part of his title.

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recovery in ejectment, conveyed with warranty to the defendant, yet he was allowed to maintain his action for mesne profits, for the deed was no release of the action.

No defence can be set up in the action for mesne profits which would have been a bar to the action of ejectment, and there is no difference in this respect between a judgment by default and a judgment after verdict. *Bacon* v. *Abeel*, 3 Johns. 481.

And plaintiff may recover as well for the costs of the ejectment as for the use of the land. *Ibid.*

Pending an action of ejectment, defendant gives up possession to a third person and plaintiff recovers, such third person is liable for mesne profits. the recovery is conclusive, and he cannot set up title in himself in bar. *Jackson* v. *Stone*, 13 Johns. 447.

In addition to this evidence the plaintiff must prove the length of time that the defendant (or his tenant, if he be the landlord,) has been in possession, the value of the mesne profits, and likewise the costs of the ejectment if they be included in the declaration as damages. He must also prove, when the judgment in ejectment is against the casual ejector for want of an appearance, and the action for mesne profits is brought against the landlord, that the defendant was landlord when the ejectment was brought, (which may be done by showing him to have received the rents and profits accruing subsequently to the day of the demise,) and that he received due notice of the service of the declaration in ejectment upon the tenant in possession; but if the landlord has subsequently promised to pay the rent and costs of the ejectment, this proof will be dispensed with.(*r*)

The plaintiff will also be entitled to give evidence of any injury done to the premises, in consequence of the misconduct of the defendant, provided such fact be specially alleged in the declaration.

If there be a recovery in ejectment against the wife, the judgment will not be evidence against the husband and wife, in an action for mesne profits; for the wife's confession of a trespass committed by her, cannot be given in evidence to affect the husband, in an action in which he is liable for the damages and costs.(*s*)

As the action for mesne profits is an action of trespass *vi et armis*, the jury are not confined in their verdict to the mere *rent* of the premises, although the action is said to be

(*r*) *Hunter* v. *Britts*, 3 Campb. 455. et MS. (*s*) *Denn* v. *White*, 7 T. R. 112.

brought to recover the *rents and profits* of the estate, but may give such extra damages as they may think the particular circumstances of the case may demand.(*t*) When the judgment in the ejectment is against the casual ejector for want of an appearance, the costs of the ejectment are generally included in the damages; and, indeed, the lessor of the plaintiff has no other remedy in that case for them. When also the ejectment is regularly defended, *the taxed costs* may, it seems, be recovered with the mesne profits as damages.(*u*) But this mode of recovering taxed costs is seldom resorted to; and where after a recovery in ejectment, and before an action for mesne profits, the defendant became bankrupt, and the lessor inserted the taxed costs of the ejectment as damages in his action for mesne profits, but the jury did not include them in their verdict in executing a writ of inquiry therein, the Court refused to set aside the inquisition; because the costs being a liquidated debt, the plaintiff might have proved them under the defendant's commission of bankruptcy, and as he had chosen to take the chance of recovering in an oblique way more than he could have recovered in a direct manner, and had failed, the Court did not think it necessary to assist him.(*v*)

If the plaintiff in an action for mesne profits recover less than forty shillings, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages; and this is the case whether the action is brought in the name of the lessor of the plaintiff in the ejectment, or in that of his nominal lessee.(*w*)

(*t*) *Goodtitle* v. *Tombs*, 3 Wils. 118.

(*u*) *Doe* v. *Davis*, 1 Esp. 358.

(*v*) *Gulliver* v. *Drinkwater*, 2 T. R. 261.

(*w*) *Doe* v. *Davis*, 6 T. R. 593. S. C. 1 Esp. 358.

If in an ejectment there be a verdict for the plaintiff, and the defendant bring a writ of error, and enter into a recognisance to pay costs in case of nonsuit, &c. pursuant to stat. 16 & 17 Car. II. c. 8. and he be nonsuited, &c. the defendant in error needs not bring a *scire facias* or debt on the recognisance, but may sue out an *elegit*, or writ of inquiry, to recover the mesne profits since the first judgment in ejectment.(*x*)

(*x*) *Short* v. *Heath*, 2 Cromp. Prac. 225.

APPENDIX.

No. 1.

Notice to quit by the landlord, to a tenant from year to year.

SIR,

I hereby give you notice to quit and deliver up, on the day of next, the possession of the messuage or dwelling house, (or "rooms and apartments," or "farm lands and premises,") with the appurtenances, which you now hold of me, situate in the parish of in the county of

Dated the day of 18

Your's, &c.

A. B.

To Mr. C. D. (the tenant in possession:) or (if it be doubtful who is tenant) To Mr. C. D., or whom else it may concern.

No. 2.

The like by an agent for the landlord.

SIR,

I do hereby, as the agent for and on behalf of your landlord A. B., of give you notice to quit and deliver up, on (&c.) (as in No. 1.) which you now hold of the said A. B., situate, (&c.)

Dated, (&c.)

Your's, &c. E. F.

Agent for the said A. B.

To Mr. C. D. (&c.)

No. 3.

The like, by the landlord, where the commencement of the tenancy is doubtful.

SIR,

I hereby give you notice, &c. (as in No. 1. to the date) provided your tenancy originally commenced at that time of the year; or, otherwise, that you quit and deliver up the possession of the said messuage, (&c.) at the end of the year of your tenancy, which shall expire next after the end of half a year from the time of your being served with this notice.

Dated, (&c.) Your's, &c.

To Mr. C. D. (&c.) A. B.

No. 4.

The like, by a tenant from year to year, of his intention to quit.

SIR,

I hereby give you notice of my intention to quit, and that I shall on the day of next, quit and deliver up the possession of the messuage, (&c.) which I now hold of you, situate, (&c.)

Dated, (&c.) Your's, &c.

To Mr. A. B. C. D.

No. 5.

Letter of attorney, to enter and seal a lease on the premises.

Know all men by these presents, that I, A. B., of have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint, C. D., of my true and lawful attorney, for me, and in my name, to enter into and take possession of a certain messuage, (&c.) late in the tenure and occupation of situate, (&c.) but now untenanted; and after the said C. D. hath taken

possession thereof; for me, and in my name, and as my act and deed, to sign, seal, and execute, a lease of the said premises with the appurtenances, unto E. F. of to hold the same to him, the said E. F., his executors, administrators, and assigns, from the of last past, before the date hereof, for the term of years, at the yearly rent of a peppercorn, if lawfully demanded: subject to a proviso, for making void the same, on tendering the sum of sixpence to the said E. F., his executors or administrators. In witness, (&c.)

Sealed and delivered, (&c.)

No. 6.

I. K. of gentleman, maketh oath and saith, that he was present, and did see A. B. of named in the letter of attorney hereunto annexed, duly sign, seal and deliver, the said letter of attorney. Affidavit of executing the same.

Sworn, (&c.) I. K.

No. 7.

This indenture, made the day of (&c.) between A. B. of of the one part, and E. F. of of the other part, witnesseth, that the said A. B. for and in consideration of the sum of five shillings of lawful money of Great Britain, to him in hand paid by the said E. F. at, or before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, hath demised, granted, and to farm let, unto the said E. F., his executors and administrators, all that Lease.

messuage, (&c) situate, (&c.) late in the tenure and occupation of but now untenanted; to have and to hold the same unto the said E. F., his executors and administrators, from the day of last past, before the date hereof, for, and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended: yielding and paying therefor yearly and every year, during the said term, unto the said A. B. or his assigns, the rent of one pepper corn, if lawfully demanded at the feast of

Provided always, and these presents are on this condition, that if the said A. B. or his assigns shall, at any time or times hereafter, tender, or cause to be tendered unto the said E. F. his executors or administrators, the sum of sixpence, that then and in such case, and from thenceforth, this present indenture, and every thing herein contained, shall cease, determine, and be absolutely void, any thing herein contained to the contrary thereof in any wise notwithstanding. In witness whereof, the parties here have interchangeably set their hand and seals, the day and year first above written.

Sealed and delivered, as the act and deed of the above named A. B. by C. D. of by virtue of a letter of attorney to him for that purpose made, by the said A. B. bearing date, (&c.) being first duly stamped in the presence of I. K.

A. B.
E. F.

No. 8.

Notice to appear, &c.

Take notice, that unless you appear in his Majesty's Court of King's Bench at Westminster,

within the first four days (or, if in the country, within the first eight days) of next
term, at the suit of the above named plaintiff, E. F., and plead to this declaration in ejectment, judgment will be thereon entered against you by default. Yours, &c.

To Mr. G. H. I. K. plaintiff's attorney.

No. 9.

In the King's Bench.

Affidavit to move for judgment in K. B.

Between { E. F. on the demise of A. B. plaintiff, and G. H. - - - - - - defendant.

I. K. of gentleman, maketh oath, and saith, that on the day of last, he, this deponent, did see C. D. in the letter of attorney hereto annexed named, for, and in the name of A. B., the lessor of the plaintiff, enter upon, and take possession of the messuage in the lease hereto also annexed mentioned, by entering on the threshold of the outer door thereof; and putting his finger into the key-hole of the said door, the said messuage being then locked up and uninhabited, so that no other entry thereon could be made, nor any possession thereof taken, without force; and this deponent further saith, that he did, on the same day, see the above named C. D. after such entry made, and whilst he stood on the threshold of the said door, duly sign and seal the lease hereunto annexed, in the name of the said A. B. and as his act and deed deliver the same unto the said E. F. the plaintiff above named; and that after the said lease was so executed, this deponent did see the said E. F. take possession of the said messuage, by virtue of the said lease, by entering upon the

threshold of the said outer door, and putting his finger into the key-hole of the said door, the said messuage being then locked up and uninhabited, so that no other entry could be made thereon, save as aforesaid; and that immediately afterwards, the said G. H. the defendant, came and removed the said E. F. from the said door, and put his foot on the threshold thereof; whereupon this deponent did, on the day and year aforesaid, deliver to the said defendant, G. H., who still continued upon the said threshold, a true copy of the declaration of ejectment, and notice thereunder written, hereto annexed. Sworn, (&c.)

No. 10.

Original writ.

George the Third, (&c.) to the sheriff of greeting: If John Doe shall give you security of prosecuting his claim, then put by gages and safe pledges, Richard Roe, late of yeoman, that he be before us on wheresoever we shall then be in England, (or in C. P. "that he be before our justices at Westminster, on ") to show wherefore, with force and arms, he entered into messuages (&c.) with the appurtenances, in which A. B. hath demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against our peace: And have you there the names of the pledges, and this writ. Witness ourself at Westminster, the day of in the year of our reign.

No, 11.

Sheriff's return thereto.

Pledges to prosecute { JOHN DEN, RICHARD FEN,

The within named Richard Roe is attached by pledges. { JOHN SMITH, WILLIAM STILES.

No. 12.

Declaration by original, on a single demise, with notice to appear thereto.

In the King's Bench, (or Common Pleas,) term, in the year of the reign of King George the Third, (to wit) Richard Roe, late of yeoman, was attached to answer John Doe of a plea, wherefore the said Richard Roe, with force and arms, &c. entered into messuages, barns, stables, outhouses, yards, gardens, orchards, acres of arable land, acres of meadow land, and acres of pasture land, with the appurtenances, situate, &c. which A. B. had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lord the now king, (&c.) And thereupon the said John Doe, by his attorney, complains; that whereas the said A. B. on, &c. at, &c. had demised the said tenements with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the day of then last past, for and during, and unto the full end and term of years from thence

next ensuing, and fully to be complete and ended: By virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became, and was thereof possessed, for the said term so to him thereof granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, &c. entered into the said tenements with the appurtenances, which the said A. B. had demised to the said John Doe, in manner, and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the now king; wherefore the said John Doe saith, that he is injured, and hath sustained damage to the value of £ and therefore he brings his suit, &c.

No. 13.

Notice to appear.

Mr. C. D.

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or some part thereof: and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next term, (or, in London or Middlesex, "on the first day of next term,") in his Majesty's Court of King's Bench, wheresoever his said Majesty shall then be in England, (or, in the Common Pleas, "in his Majesty's Court of Common Bench at Westminster,") by some attorney of that court; and then and there, by rule of the same court, to cause yourself to be made defendant in my stead;

otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession,

Your's, &c.

Richard Roe.

No. 14.

The like on a double demise, with one ouster.

In the King's Bench, (or Common Pleas.) term, (&c.) (to wit,) Richard Roe, late of yeoman, was attached to answer John Doe, of a plea wherefore the said Richard Roe, with force and arms, &c. entered into messuages, (&c.) with the appurtenances, situate &c. which A. B. had demised to the said John Doe, for a term which is not yet expired; And, also, wherefore the said Richard Roe, with force and arms, &c. entered into other messuages, (&c.) with the appurtenances, situate &c. which E. F. had demised to the said John Doe for a term which is not yet expired, and ejected him from his said several farms, and other wrongs, (&c.) And, thereupon, (&c.) that whereas the said A. B. on, &c. at, &c. had demised the said tenements first above mentioned, with the appurtenances, to the said John Doe; to have and to hold the same to the said John Doe, and his assigns, from the day of then last past, for and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended.* And, also, that whereas the said E. F. on, &c. at, &c. had demised the said tenements secondly above-mentioned with the appurtenances, to the

said John Doe, to have and to hold the same to the said John Doe and his assigns, from the said day of then last past, for and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended: By virtue of which said several demises, the said John Doe entered into the said several tenements first and secondly above mentioned with the appurtenances, and became, and was thereof possessed, for the said several terms, so to him thereof respectively granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, (&c.) entered into the said several tenements first and secondly above mentioned with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner and for the several terms aforesaid, which are not yet expired, and ejected the said John Doe from his said several farms; and other wrongs; &c. (as in the preceding precedent with the like notice to appear.)

No. 15.

The like, with two ousters.

(As in last precedent to this mark.*) By virtue of which said demise, the said John Doe entered into the said tenements first above mentioned with the appurtenances, and became, and was thereof possessed, for the said term so to him thereof granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, (to wit,) on, &c. with force and arms, &c. entered into the said tenements first above mentioned with the appurtenances, which the said

A. B. had demised to the said John Doe, in manner, and for the term aforesaid, which is not yet expired, and ejected him, the said John Doe, from his said farm: And, also, that whereas the said E. F. on, &c. at, &c. had demised the said tenements secondly above mentioned, with the appurtenances, to the said John Doe; to have and to hold the same to the said John Doe and his assigns, from the said day of then last past, for and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended; By virtue of which said last mentioned demise, the said John Doe entered into the said tenements secondly above mentioned with the appurtenances, and became, and was thereof posessed for the said last mentioned term so to him thereof granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, &c. entered into the said tenements secondly above mentioned with the appurtenances, which the said E. F. had demised to the said John Doe, in manner, and for the term last aforesaid, which is not yet expired, and ejected the said John Doe from his said last mentioned farm, and other wrongs, &c. (as in No. 14, with the like notice to appear.)

No. 16.

Affidavit of service of declaration in ejectment.

In King's Bench, (Common Pleas, or Exchequer Pleas.)

Between { John Doe on the demise of A. B. plaintiff, and Richard Roe, - - - - - defendant,

I. K., of gentleman, maketh oath, that he, this deponent, did, on, &c. * person-

ally serve C. D., tenant in possession of the premises in the declaration of ejectment hereunto annexed mentioned, or (if he be not tenant of the whole) some part thereof, with a true copy of the said declaration, and of the notice thereunder written, hereunto annexed, and this deponent, at the same time, read over the said notice to the said C. D., and explained to him the intent and meaning of such service, † (or generally thus: and this deponent, at the same time, acquainted the said C. D. of the intent and meaning of the said declaration and notice.)

Sworn, &c.

I. K.

No. 17.

The like, where there are several tenants.

(As in last precedent to this mark *) personally serve C. D., (&c.) tenants in possession, (&c.) (as in the last) with the said declaration, and the notice thereunder written, by delivering a true copy of the said declaration and notice to each of them the said C. D., &c. (and, if the notice was not directed to all the tenants, say "except that the said notice was directed to each of them the said C. D., &c. separately;") and this deponent, at the same time, read over the said notice to each of them the said C. D., (&c.) and explained to them respectively the intent and meaning of such service; (or generally, that "this deponent, at the same time, acquainted each of them the said C. D., &c. of the intent and meaning of the said declaration and notice.") Sworn, &c.

I. K.

No. 18.

The like, where the declaration was served on one tenant, and the wife of another.

(As in No. 16, to *) personally serve C. D., tenant in possession of part of the premises in the declaration of ejectment hereunto annexed mentioned, with a true copy, &c. (as in No. 16, to †:) And this deponent further saith, that he did, on the same day, also serve G. H., tenant in possession of other part (or residue) of the premises in the said declaration mentioned, with another true copy of the said declaration and notice thereunder written, by delivering the same to, and leaving it with M. H., the wife of the said G. H., at the dwelling house of the said G. H., being parcel of the premises in the said declaration mentioned, and this deponent, at the same time, read over the notice thereunder written to the said M. H., and explained to her the intent and meaning of such service. (Sworn, &c.)

I. K.

No. 19.

The like, on stat 4. Geo. II. chap. 28. where the premises are untenanted.

In the King's Bench, (&c.)

Between { John Doe on the demise of A. B., plaintiff, and Richard Roe, - - - - - defendant.

A. B., of lessor of the plaintiff in this case, and I. K., of gentleman, severally make oath and say; and first, this deponent, I. K., for himself saith, that he did, on, &c. affix a copy of the declaration in ejectment hereunto annexed, and the notice thereunder written, upon the door of the messuage in the said declaration mentioned, (or, in case the ejectment is not for the recovery of a messuage, "upon being a notorious place of lands, tene-

ments, or hereditaments, comprised in the said declaration in ejectment,") there being no tenant then in actual possession thereof. And this deponent, A. B., for himself saith, that before such copy of the said declaration in ejectment was so fixed, as aforesaid, there was due to him, this deponent, as landlord of such messuage, (or, "lands, tenements, or hereditaments,") with the appurtenances, from C. D., the tenant thereof, the sum of £ for half a year's rent, upon and by virtue of a certain indenture of lease, bearing date, &c. and made between, &c. and that no sufficient distress was then to be found upon the said messuage, (or, "lands, tenements, or hereditaments,") with the appurtenances, countervailing the arrears of rent then due to this deponent: And this deponent further saith, that at the time of affixing the copy of the said declaration in ejectment, as aforesaid, he had power to re-enter the said messuage, (or, "lands, tenements, and hereditaments,") with the appurtenances, by virtue of the said lease, for the nonpayment of the rent so in arrear, as aforesaid.

Sworn, (&c.) A. B.
I. K.

No. 20.

Rule for judgment for the whole premises in K. B.

next after in the year of, &c.

Doe on the demise of A. B. } Unless the tenant
v. Roe, - - - - - - - - - } in possession of (or, if the premises are untenanted, "unless some person claiming title to,") the premises in question shall appear and plead to issue, on

next after let judg-

ment be entered for the plaintiff, against the now defendant Roe by default.

Upon the motion of Mr.

By the Court.

No. 21.

Doe on the demise of A. B. } Unless C. D., te- The like, for part.
v. Roe, - - - - - - - - - } nant in possession of part of the premises in question, shall appear and plead to issue, on next after let judgment be entered for the plaintiff, against the now defendant Roe, by default: But execution shall issue for such part of the premises only as is in his possession.

Upon the motion of Mr.

By the Court.

No. 22.

Doe on the demise of A. B. } Unless C. D. (&c.) The like, where part of the premises are tenanted, and part untenanted.
v. Roe, - - - - - - - - - } tenants in possession of part of the premises in question, and unless or some other person claiming title to such part of the said premises as are untenanted, shall appear and plead to issue, on next after let judgment be entered for the plaintiff, against the now defendant Roe, by default: But execution shall issue for such part of the premises only as is in the possession of the said tenants, and such other parts as are untenanted.

By the Court.

No. 23.

Judgment for the plaintiff by nil dicit by original in K. B. with a *remittitur damna.*

As yet of term, in the year, &c.

Witness, Edward Lord Ellenborough.

(to wit,) John Doe, on the demise of A. B. puts in his place I. K. his attorney, against Richard Roe, in a plea of trespass and ejectment of farm.

——————(to wit.) The said Richard Roe in person, at the suit of the said John Doe, in the plea aforesaid.

——————(to wit.) Richard Roe was attached to answer John Doe, &c. (*copy the declaration to the end, omitting the notice, and proceed on a new line as follows ;*)

And the said R. R. in his proper person, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said J. D. whereby the said J. D. remains therein undefended against the said R. R.: Therefore, it is considered, that the said J. D. recover against the said R. R. his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and also his damages sustained by reason of the trespass and ejectment aforesaid :—And hereupon the said J. D. freely here in court remits to the said R. R. all such damages, costs, and charges, as might, or ought to be adjudged to him, the said J. D., by reason of the trespass and ejectment as aforesaid: therefore, let the said R. R. be acquitted of those damages, costs, and charges, &c. :—And hereupon the said J. D. prays the writ of the said lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come, of

and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable before the said lord the king, on ————wheresoever, &c.

No. 24.

Consent of attornies, for the tenant to be admitted to defend, &c. in K. B.

————on, (or next after,)————
——in the————year, &c.

————(to wit.) Doe on the demise of A. B. against Roe, for messuages, (&c.) in the parish of in the said county: (*or, if there be several demises, say*) "Doe, on the demise of A. B. for messuages, (&c.) in the parish of in the said county, and, also, on the demise of E. F. for other messuages, (&c.) in the parish of in the said county, against Roe;" *and if the tenant appear for part only, add,* "being part of the premises mentioned in the declaration." It is ordered by the consent of the attornies for both parties, that C. D. be made defendant in the stead of the now defendant Roe, and do forthwith appear at the suit of the plaintiff; and (*if the ejectment be by bill*) file common bail, and receive a declaration in an action of trespass and ejectment, for the premises in question, and forthwith plead thereto not guilty, and upon the trial of the issue,* confess lease, entry, and ouster, and insist upon the title only; otherwise let judgment be entered for the plaintiff against the now defendant Roe, by default: And if, upon the trial of the said issue, the said C. D. shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prose-

cute his writ (or "bill,") against the said C. D. then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the plaintiff, in that case to be taxed: And it is further ordered, that if, upon the trial of the said issue, a verdict shall be given for the said C. D. or it shall happen that the plaintiff shall not further prosecute his said writ (or "bill,") for any other cause, than for not† confessing lease, entry, and ouster, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

I. K. attorney for the plaintiff,
L. M. attorney for the defendant.

No. 25.

Consent Rule in C. P.

In the Common Pleas.

———— term in the ————year &c.

———— the———day of

———(to wit.) Doe, on the demise of A. B. against Roe, for ——— messuages, &c. (*as in the last precedent.*) } It is ordered by consent of I. K. attorney for the plaintiff, and L. M. attorney for C. D., who claims title to the tenements in question, that the said C. D. shall be admitted defendant, and that the said C. D. shall immediately appear by his said attorney, who shall receive a declaration, and plead thereto the general issue, this term; and that at the trial to be had thereon, the said C. D. shall appear in his proper person, or by his counsel or attorney, and confess lease, entry, and ous-

ter for so much of the tenements specified in the plaintiff's declaration, as are in the possession of the said defendant or his tenant, or any person claiming by, or under his title; or that, in default thereof, judgment shall be thereupon entered against the defendant, Richard Roe, the casual ejector: but proceedings shall be stayed against him, until default shall be made in any of the premises. And, by the like consent, it is further ordered, that if, by reason of any such default, the plaintiff shall happen to be nonsuited upon the trial, the said C. D. shall take no advantage thereof, but shall thereupon pay to the plaintiff costs, to be taxed by the prothonotaries. And it is further ordered, that the lessor of the plaintiff shall be liable to the payment of costs to the said C. D. by the Court here, to be in any manner allowed or adjudged.

By the Court.

No. 26.

In the King's Bench.

Affidavit in support of rule, to authorize the tenant to confess lease and entry only in K. B.

C. D. of ———— maketh oath, and saith, that no actual ouster of the lessor of the plaintiff has been committed by this deponent, and that (as he, this deponent, verily believes,) this ejectment may involve a question between tenants in common, or joint-tenants.

Sworn, (&c.) C. D.

No. 27.

Rule in K. B. to authorize the tenant to confess lease & entry only.

Doe, on the demise of A. B. } Upon reading the
v. Roe - - - - - - - - - } rule made yesterday, and upon hearing Mr. ———— &c. for

the lessor of the plaintiff, and Mr. ——————&c. for the tenant; it is ordered, that the defendant enter into a rule for confessing lease and entry, and also for confessing ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise.

By the Court.

No. 28.

Consent Rule thereon.

Doe v. Roe. } It is ordered, &c. (*as in No.* 24. *to* *) confess lease and entry, and also ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise, and insist upon the title, and such actual ouster only; otherwise let judgment be entered for the plaintiff against the now defendant Roe, by default. And if, upon the trial of the said issue, the said C. D. shall not confess ———————— lease and entry, and also ouster, upon the condition aforesaid, whereby, &c. (*as in No.* 24 *to* †) confessing lease and entry, and also ouster subject to the conditions aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

By the court.

No. 29.

Rule in K. B. for admitting the landlord to defend, &c.

Doe, on the demise of A. B. v. Roe - - - - - - - - - } It is ordered, that E. F. landlord of the tenant in possession of the premises in question in this cause, shall be joined and made defendant with the said tenant, if he shall appear: And the said E. F. desiring, if the said tenant

shall not appear, that he may appear by himself, and consenting that in such case he will enter into the common rule to confess lease, entry, and ouster, in such manner as the said tenant ought, in case he had appeared; (*or if the rule be special, to confess lease and entry only, say*, "to confess lease and entry only, without ouster, unless an actual ouster of the lessor of the plaintiff, by the said C. D. or those claiming under him, be proved at the trial,") leave is given to the said E. F. pursuant to the late act of Parliament, if the said tenant shall not appear, to appear by himself, and upon his entering into such Common Rule, to become defendant in the stead of the casual ejector, and to defend his title to the said premises without the said tenant: the plaintiff nevertheless is at liberty to sign judgment against the casual ejector; but execution thereon is stayed, until the court shall further order. Upon the motion of Mr. ————

By the court.

No. 30.

C. D. - - - - - - - - - - - - } term, (&c.) Plea of not guilty.
ats. } And the said C. D.,
Doe, on the demise of A. B. } by L. M., his attorney, comes and defends the force and injury, when, &c. and says that he is not guilty of the supposed trespass and ejectment, (or if several ousters are laid in the declaration, "of the supposed trespasses and ejectments,") above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him; And of this he, the said C. D., puts himself upon the country, &c.

No. 31.

Plea of ancient demesne.

C. D. - - - - - - - - - - } And the said ——— ats. } by ——— his attor- Doe, on demise of A. B. } ney comes and defends the force and injury, when, &c. and says, that all the tenements and premises in the declaration aforesaid specified, in which the trespass and ejectment are above supposed to have been done, are held of ——— as of his manor of ——— in the county of ——— and which said manor is, and from time whereof the memory of man is not to the contrary, was of ancient demesne of the crown of the king of England, and now of our lord the king; and that the aforesaid tenements and premises are, and for all the time aforesaid, were pleaded and pleadable in the court of the same manor by patent writ of our lord the king, of right close only, and not elsewhere or otherwise; and this he is ready to verify as the Court shall think proper: Wherefore, he prays judgment, if the Court of our said lord the king, now here, will take cognisance of the said plea, &c.

No. 32.

Affidavit to accompany plea of ancient demesne.

C. D. the tenant in possession of the premises in the declaration of ejectment in this cause above mentioned, maketh oath, and saith, that the said premises in the said declaration in this cause above mentioned, with the appurtenance, are held of ———as of his manor of———in the county of ——— ———and which said manor is holden in an-

cient demesne: And this deponent further saith, that there is a Court of ancient demesne held within the said manor of ———— and that there are suitors in the same Court, in which said Court, and before which suitors the said A. B. the lessor of the plaintiff above named might have proceeded in the said ejectment; and this deponent further saith, that to the best of this deponent's knowledge and belief, the said A. B., the said lessor of the plaintiff is seised in his demesne as of fee, of and in the said premises, with the appurtenances in the said declaration of ejectment mentioned. C. D.

Sworn, &c.

No. 33.

Postea for defendant on a nonsuit, for not confessing lease, entry and ouster.

Afterwards, that is to say, on, &c. at, &c., before, (&c.) comes the within named John Doe, by his attorney within mentioned, and the within-named C. D. although solemnly required, comes not, but makes default; therefore, let the jurors of the jury whereof mention is within made, be taken against him by his default; and the jurors of that jury being summoned also to come, and to speak the truth of the matters within contained, being chosen, tried, and sworn, the said C. D., although solemnly called to appear by himself or his counsel or attorney, to confess lease, entry, and ouster, doth not come, by himself or his counsel or attorney, nor doth he confess lease, entry, and ouster, but therein makes default; wherefore the said John Doe doth not further prosecute his writ, (or bill,) against the said C. D.

Therefore, (&c.)

No. 34.

Judgment for the plaintiff, as to part of the premises, and for the defendant, on a *nolle prosequi*, as to the residue.

(*To the end of the issue, and then as follows:*) At which day, before our lord the king at Westminster, comes, (*or in the Common Pleas or Exchequer*, " At which day comes here,") the parties aforesaid by their attornies aforesaid; and hereupon the said C. D. as to ——————parcel of the tenements in the said declaration mentioned, relinquishing his said plea by him above pleaded, says, that he cannot deny the action of the said John Doe, nor but that he, the said C. D. is guilty of the trespass and ejectment above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him: And upon this the said John Doe says, that he will not further prosecute his suit against the said C. D. for the trespass and ejectment in the residue of the tenements aforesaid; and he prays judgment, and his term yet to come, of and in the said ———— ———— with the appurtenances, parcel, &c. together with his damages, costs, and charges, by him in this behalf sustained: Therefore, it is considered, that the said John Doe do recover against the said C. D. his said term yet to come, of and in the said ———————— with the appurtenances, parcel, (&c.) and also £ ———————— for his said damages, costs, and charges, by the Court of the said lord the king now here adjudged to the said John Doe, and with his assent, and also with the assent of the said C. D.: And let the said C. D. be acquitted of the said trespass and ejectment in the residue of the tenements aforesaid, and go thereof without day, (&c.): And the said John Doe prays the writ of our said lord the king, to be directed to the sheriff of ————

——— aforesaid, to cause him to have possession of his said term yet to come of, and in the said ——————— with the appurtenances, parcel, (&c.) and it is granted to him, returnable before our said lord the king on ——— wheresoever, (&c.) (*or in the Common Pleas or Exchequer*, "returnable here on ——————— &c.")

No. 35.

Doe on the demise of A. B. } Upon reading a rule
v. Roe, - - - - - - - - - } made in this cause
on ——————————— and E. F., therein named, having made himself defendant in the stead of the casual ejector, pursuant to the said rule, and the postea in the said cause being produced and read, and a rule made in the same cause this day; it is ordered, that the said E. F., upon notice of this rule to be given to his attorney, (&c.) show cause, why the plaintiff should not have leave to sue out execution, upon the judgment signed against the casual ejector pursuant to the first mentioned rule. Upon the motion of Mr. ———

Rule for execution against the casual ejector, where the landlord had been made defendant, and failed at the trial.

By the Court.

No. 36.

George the Third, (&c.) To the Sheriff of — ——— greeting: Whereas, John Doe, lately in our court before us at Westminster, by our writ, (*or if by bill, say*, "by bill without our writ,") and by the judgment of the same court recovered against C. D., (*or if the judgment be by default* "against Richard Roe,") his term then and yet to come, of and in ——————— dwelling houses, &c.

Habere facias possessionem.

(*as in the declaration in ejectment*) with the appurtenances, situate, &c. which A. B., on, &c. had demised to the said J. D., to hold the same to the said J. D. and his assigns, from, &c. for and during, and unto the full end and term of ——— years from thence next ensuing, and fully to be complete and ended, * by virtue of which said demise, the said J. D. entered into the said tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards, (to wit,) on, &c. with force and arms, (&c.) entered into the said tenements with the appurtenances, which the said A. B. had demised to the said J. D. in manner, and for the term aforesaid, which was not then, nor is yet expired, and ejected the said J. D. from his said farm ☞; whereof the said C. D. is convicted, as appears to us of record; therefore we command you, that without delay you cause the said J. D. to have the possession of his said term yet to come of and in the tenements aforesaid, with the appurtenances: and in what manner you shall have executed this our writ, make appear to us, on wheresoever we shall then be in England, (or by bill, "to us at Westminster, on next after ,"†) and have there (or by bill, "have there then,") this writ. Witness, Edward Lord Ellenborough, (&c.)

No. 37.

The like, on a double demise.

(As in preceding precedent to*;) and also his term, then, and yet to come, of and in other dwelling houses, (&c.) with the appurtenances, which E. F., on, &c. had demised to the said J. D., to hold the same to the said J. D. and his assigns, from, &c. for and during, and unto,

the full end and term of years from thence next ensuing, and fully to be complete and ended; by virtue of which said several demises, the said J. D. entered into the said several tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards, to wit, on, &c. with force and arms, &c. entered into the said several tenements with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner, and for the several terms aforesaid, which were not then, nor are yet expired, and ejected the said J. D. from his said several farms; whereof the said C. D. is convicted, (*adding in K. B.* "as appears to us of record:") therefore we command you, that without delay, you cause the said J. D. to have the possession of his said several terms yet to come, of and in the said several tenements, with the appurtenances: and in what manner, &c. (*as in preceding precedent to the end.*)

No. 38.

The like, and fieri facias for costs, by original in K. B.

(As in No. 36, to †.) We also command you, that of the goods and chattels of the said C. D., in your bailiwick, you cause to be made £. which the said J. D., lately in our said court before us, at Westminster, aforesaid, recovered against the said C. D. for his damages, which he had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him, about his suit, in that behalf expended; whereof the said C. D. is convicted, as appears to us of record: and have you the moneys before us, on the return day aforesaid, wheresoever, (&c.) to be rendered to the said John Doe,

for his damages aforesaid, and have there this writ. Witness, Edward Lord Ellenborough.

No. 39.

The like, and capias ad satisfaciendum for costs, by original in K. B.

(As in No. 36, to †) we also command you, that you take the said C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us, on the return day aforesaid, wheresoever, (&c.) to satisfy the said J. D. £. which in our said court before us, at Westminster aforesaid, were adjudged to the said J. D., for his damages, which, &c. (*as in preceding precedent to the end.*)

No. 40.

The like, and also for costs in error, on an affirmance in the House of Lords.

(Copy the last precedent to the end, omitting the words "and have there this writ," and then as follows :) and also £. which in our Court of Parliament were adjudged to the said J. D., according to the form of the statute in such case made and provided, for his damages, costs and charges, which he had sustained and expended, by reason of the delay of execution of the judgment aforesaid, on pretext of prosecuting our writ of error, brought thereupon by the said C. D. against the said J. D., in the same Court of Parliament, the said judgment being there in all things affirmed: whereof the said C. D. is also convicted, as by the inspection of the record and proceedings thereof, remitted from our said Court of Parliament into our said court before us, likewise appear to us of record ; and have there this writ. Witness, (&c.)

No. 41.

(As in No. 36. to "whereof the said C. D. is convicted," &c. and then as follows :) and whereas we afterwards, to wit, in —— term aforesaid, by our writ, commanded you, that without delay you should cause the said J. D. to have possession of his said term, then to come, of and in the tenements aforesaid, with the appurtenances ; and that you should make known to us on a day now past, in what manner you should have executed that our writ : and because since the issuing of our said writ, it hath appeared to us, that the said judgment, obtained by the said J. D., in manner aforesaid, was irregularly obtained, and that our said writ thereupon issued improvidently and unjustly ; therefore we command you, that if possession of the tenements aforesaid, with the appurtenances, hath, by virtue of our said writ, been given or delivered to the said J. D., then that without delay you cause restitution of the said tenements with the appurtenances, to be made to the said G. H. or his assigns, at whose instance the judgment aforesaid hath been set aside by our said Court, he, the said G. H., being landlord and owner of the tenements aforesaid, with the appurtenances ; and that whatever has been done by virtue of our said writ, you deem altogether void, and of no effect, as you will answer the contrary at your peril : and in what manner, &c. (as in No. 34. to the end.)

Writ of restitution.

No. 42.

As in No. 36. to this mark ☞, and then as follows :) and also £.—— for the damages which the

Scire facias for the plaintiff.

said John Doe had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him, about his suit in that behalf expended; whereof the said C. D. is convicted; as appears to us of record: And now, on the behalf of the said J. D. in our said Court before us, we have been informed, that although judgment be thereupon given, yet execution of that judgment still remains to be made to him; wherefore the said J. D. hath humbly besought us to provide him a proper remedy in this behalf; and we being willing that what is just in this behalf should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said C. D. (*if against the casual ejector* "to the said Richard Roe, and also to———— and ————the tenants in possession of the premises aforesaid,") that he, (or they,) be before us, on — wheresoever, (&c.) to show if he has or knows of any thing to say for himself, or, (if they have or know, or if either of them hath or knoweth, of any thing to say for themselves or himself,) why the said J. D. ought not to have the possession of his said term yet to come, of and in the tenements aforesaid, and also execution of the damages, costs and charges, aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do, and further to do and receive what our said Court before us shall consider of him, (or them,) in this behalf: And have there the names of those by whom you shall so make known to him, (or them,) and this writ.

Witness, Edward Lord Ellenborough, (&c.)

No. 43.

Rule for staying proceedings, till a guardian be appointed for an infant lessor to answer costs.

Doe, on the demise of A. B. } Upon reading the
v. Roe - - - - - - - - - } affidavit of L. M. (&c.) it is ordered, that the lessor of the plaintiff, upon notice, (&c.) show cause, why further proceedings in this action should not be stayed, until a sufficient guardian be appointed for the lessor of the plaintiff, who will undertake to pay to the defendant such costs as may happen to be adjudged to him; and that in the mean time further proceedings be stayed. Upon the motion of Mr. ———

By the Court.

No. 44.

The like, till security be given for costs.

Doe, on the demise of A. B. } Upon reading
v. Roe - - - - - - - - - - } the affidavit of L. M. and another, it is ordered, that the lessor of the plaintiff, upon notice, (&c.) show cause, why further proceedings in this action should not be stayed, until * sufficient security be given to answer the defendant his costs, in case the plaintiff be nonsuited, or a verdict shall be given for the said defendant; and that in the mean time further proceedings be stayed. Upon, &c.

No. 45.

The like, in C. P. until the costs are paid of a former action in K. B.

(As in No. 44, to *) the costs taxed in a former action brought in the Court of King's Bench, on the demise of the lessor of the plaintiff, for the same premises, are paid; and in the mean time and until this Court shall otherwise order, that all further proceedings be stayed. Upon, &c.

No. 46.

The like, on payment of mortgage money, &c.

Upon reading the affidavit of G. H., it is ordered, that the lessor of the plaintiff, upon notice, (&c.) shall show cause, (&c.) why, upon the defendant's bringing into this Court the principal money and interest due to the lessor of the plaintiff upon his mortgage, and also such costs as have been expended in any suit or suits at law or equity upon such mortgage, his costs in this cause to be ascertained, computed, and taxed, by one of the prothonotaries, the money so brought into this Court should not be deemed and taken to be in full satisfaction and discharge of such mortgage; and upon payment thereof to the lessor of the plaintiff, why all proceedings in this action should not be stayed; and why the mortgaged premises, and the lessor of the plaintiff's estate and interest therein, should not be assigned and conveyed, at the cost and charges of the defendants, to such person as they shall appoint; and why all deeds, evidences, and writings, in the custody of the lessor of the plaintiff, relating to the title of such mortgaged premises, should not be delivered up to the defendants, or to such person or persons as they shall for that purpose nominate and appoint. By the Court.

No. 47.

The like, on payment of rent, &c. in K. B.

Doe, on the demise of A. B. v. Roe. - - - - - - - - - } Upon reading the affidavit of the defendant, it is ordered, upon the said defendant's forthwith bringing into Court the whole rent due and in arrear, and such sum to answer the costs as the master shall direct, that further proceedings

in this cause be stayed. And it is referred to the master to compute the said arrears of rent, and to tax the said costs; and upon the said defendant's paying the said lessor of the plaintiff what the said master shall find due, and allow for the said rent and costs, that all further proceedings therein as to the non-payment of the said rent, be stayed. But it is further ordered, if the said lessor of the plaintiff has any other title to the premises in question, than for the non-payment of the said rent, he is at liberty to proceed. Upon the motion of Mr. ——

By the Court.

No. 48.

AN ACT *in addition to the act concerning Judgments and Executions.*

Passed April 12, 1820.

I. *BE it enacted by the People of the State of New-York, represented in the Senate of Assembly,* That whenever any lands or tenements shall be sold after the first day of May next, by virtue of any execution already issued, or that shall hereafter be issued, it shall be the duty of the sheriff or other officer, instead of executing a deed for the premises sold, to give to the purchaser or purchasers of such lands or tenements a certificate in writing, describing the lands or tenements purchased, and the sum paid therefor, and the time when the purchaser will be entitled to a deed for such lands or tenements, unless the same shall be redeemed, as is provided in and by this act: And such sheriff or other officer shall, within ten days from the time of such sale, file in the office of the

Sheriffs to give on sales by execution certificates & not deeds.

To be filed.

clerk of the county, a duplicate of such certificate, signed by him; and such duplicate certificate, or a certified copy thereof, shall be taken and deemed evidence of the facts therein contained.

Defendants may redeem their lands sold on execution.

II. *And be it further enacted*, That it shall and may be lawful for any defendant, his heirs, executors, administrators, or grantees, whose lands or tenements shall be sold after the first day of May next, by virtue of any execution, within one year from and after such sale, to redeem such lands or tenements, by paying to the purchaser thereof, his executors, administrators, or assignees, or to the sheriff or other officer who sold the same, for the benefit of such purchaser, the sum of money which may have been paid on the purchase thereof, together with the interest thereon, at the rate of ten per centum per annum, from the time of such sale; and on such payment being made as aforesaid, the said sale, and the certificate thereupon granted, shall be null and void.

In what cases other creditors may redeem, &c.

III. *And be it further enacted*, That it shall also be lawful for any creditor of any defendant, whose lands or tenements shall have been sold under any execution, after the first day of May next, who shall have a decree in chancery, or a judgment at law against such defendant, which shall be a lien on the real estate of such defendant, and for the executors or administrators of any creditor having such decree or judgment, within fifteen months after such sale, in the default of the said defendants, to redeem the lands or tenements which shall have been so sold, in the manner prescribed in the second section of this act; but that the defendant shall, in all cases, be entitled to redeem such lands or tenements in preference to any creditor: And whenever any creditor shall redeem such lands or

Defendants have preference.

tenements as aforesaid, he shall be entitled to, and acquire all the rights of the original purchaser thereof; and any other creditor having such decree or judgment aforesaid, and the executor or administrator of any such creditor, may, in like manner, redeem the lands or tenements so sold, within fifteen months from the sale thereof, and may become entitled to all the rights and privileges acquired by any other creditor, by reimbursing to him, his executors, administrators or assigns, the sum which may have been paid by such creditor, together with interest thereon from the time of such payment, at the rate of seven per centum per annum, and by also satisfying any prior judgment or decree which such creditor may have against such defendant; and, in like manner, any other creditor having such decree or judgment aforesaid, and the executor or administrator of any such creditor may, within the time aforesaid, redeem such lands or tenements, from such first, second, third, or any other creditor; and upon such redemption being made in manner aforesaid, the title of the original purchaser shall be vested in such creditor or his executors or administrators.

15 months allowed.

IV. *And be it further enacted*, That if such lands or tenements so sold, shall not be redeemed as aforesaid, either by the defendant or by such creditor as aforesaid, within fifteen months from the time of such sale, it shall be the duty of the sheriff or other officer who shall have sold the same, or his executors or administrators, to complete such sale, by executing a deed of the premises so sold to the said purchaser; and if any creditor shall redeem such lands or tenements as aforesaid, it shall be the duty of such sheriff, or other officer, on the expiration of fifteen months from the time of such

Sheriff to give deed, when land is not redeemed.

sale, to execute a deed of the premises so sold, to such creditor, as the assignee of the original purchaser, and such deeds shall be as valid and effectual in the law, as if such creditor had been the original purchaser.

Waste by debtor how prevented.

V. *And be it further enacted*, That if, at any time after the sale of the premises as aforesaid, and before the expiration of the time allowed for redeeming the same, the debtor, or any person in the possession of the premises thus sold, shall do any acts of waste thereon, it shall be lawful for the chancellor of this state, or for the first judge of the county wherein said premises are situate, on application by the purchaser, or his authorized agent for that purpose, and on satisfactory proof being made of waste having been committed by such debtor or occupant, to grant an order against such wrong-doer to stay any further waste, under such penalties as such chancellor or judge shall impose, conformable to the powers and regulations incident to a Court of Chancery in all other cases, and which are hereby extended to such first judge for that purpose.

No. 49.

AN ACT *to amend an act, entitled "an act concerning Distresses, Rents, and the renewal of Leases," passed April 5th*, 1813, *and for other purposes.*

Passed April 13, 1820.

Proceedings when a tenant holds over.

I. *BE it enacted by the People of the State of New-York, represented in Senate and Assembly*, That if any tenant or lessee at will, or at sufferance, or for part of a year, or one or more years,

or from year to year, of any houses, lands, messuages, tenements or hereditaments; or the assigns, under tenants, or legal representatives of such tenant, or lessee, shall, after the expiration of his, her, or their term, hold over and continue in possession of the same, or any part thereof, without the permission of the landlord or lessor of the premises; or if any such person or persons shall so hold over, without such permission as aforesaid, after default in the payment of rent, pursuant to the contract or agreement under which such premises shall be held, it shall be lawful for such landlord or lessor, or his heirs, executors, administrators, attorney, agent, bailiff, receiver, or assigns, to make oath, in writing, of the expiration of such term, or of such default in the payment of such rent, and of such holding over, without permission as aforesaid, and thereupon to apply to the mayor, recorder, or any one of the aldermen, special justices, justices of the Marine Court, or any one of the assistant justices of the city of New-York, if the premises are situated in the said city; or to any judge of the Court of Common Pleas, or mayor or recorder of any other city or county within which the demised premises may be situated, who, on receiving such oath in writing, are hereby required to issue a summons, requiring the person or persons in possession of the said premises, or claiming the possession thereof, forthwith to remove from the same, or show cause before the magistrate issuing such summons, on the same day, or within such time, not exceeding five days after the service thereof, as to him shall, under all the circumstances, appear to be reasonable, why such landlord or lessor, or his heirs, assigns, or legal representatives, should not be put in possession of

the said premises; and if no sufficient cause be shown to the contrary, such magistrate shall issue an order or warrant, to be directed to the sheriff of the county within which the premises are situated, or to any constable or marshal of any city or town, commanding him to remove all persons from the said premises, and to put such landlord or lessor, or his or their heirs, executors, administrators or assigns, into the possession thereof. And the said sheriff, constable, or marshal, is hereby required to obey and execute such order or warrant: *Provided always*, That in case of a tenancy at will or sufferance, the landlord or lessor shall give three months notice in writing to the tenant or tenants of the premises, requiring him or them to remove therefrom, before applying to a magistrate for relief under this act: which notice shall be served by delivering the same to such tenant or tenants, or some person of proper age residing on the premises: and if the tenant or tenants cannot be found, or there be no such person residing on the premises, then such notice shall be served by putting up the same on the most conspicuous part of the premises, and where the same can be the most conveniently read: *And provided also*, That in the case of a proceeding for non-payment of rent, as before mentioned, there shall have been a demand of such rent, or three days notice, in writing, by the person or persons entitled to such rent, to the person or persons owing the same, requiring the payment of the said rent, or the delivery of possession of the premises, to be served in the same manner as last provided.

Proviso.

Further proviso.

II. *And be it further enacted*, That if such person or persons in possession of such premises as aforesaid, or claiming the possession thereof, shall

Jury when to be summoned.

make oath that the term in the premises in question is not expired, or that he, she, or they, do not hold or claim the said premises contrary to an agreement then existing between them and the person or persons applying for such summons as aforesaid; or in the case of an application by reason of the non-payment of rent, if the person or persons against whom such application is made, shall make oath that such rent is not in arrear and unpaid, the said magistrate, or any other of the said magistrates before named, in their respective cities and counties, shall issue a precept, directed to the sheriff of the said city or county, commanding him to summon a jury of twelve men, qualified to serve as jurors in courts of record, to appear before the magistrate issuing such precept, either on the day of issuing such precept, or on the day thereafter, who shall hear the proofs and allegations of the parties, and under the advice and direction of such magistrate last mentioned, shall hear and determine the matter in difference between the said parties; that the said jury shall be empanelled and sworn as is usual in trials by jury in courts of record; and if the verdict of the said jury shall be for the landlord or lessor, or person or persons applying for the summons in the first instance, as herein provided, the said magistrate, before whom such trial by jury shall take place, shall issue a similar order or warrant to put the landlord or lessor, or person or persons applying for such summons in the first instance as aforesaid, into the possession of the premises, as is provided for in the first section of this act.

Security for rent, and non-payment, &c.

III. *And be it further enacted*, That in the case of a proceeding under this act for the non-payment of rent, if the decision of the magistrate or

the verdict of the jury, as the case may be, shall be against the person or persons of whom such rent is claimed, the contract or agreement, and the relation of landlord and tenant between the parties shall be thereafter cancelled and annulled, unless the person or persons owing such rent shall forthwith pay the said rent, and the costs of proceeding under this act, or give such security to the person or persons entitled to the said rent, for the payment thereof, with costs, in ten days thereafter, as shall be satisfactory to the said magistrate: *And further*, That no proceeding for non-payment of rent shall take place under this act, in any case where it shall appear that satisfaction for such rent might have been obtained by distress.

Construction of certain agreements.

IV. *And be it further enacted*, That every agreement which shall be made for the hiring or occupation of any lands or tenements in the city of New-York, and which shall not particularly specify the time during which such hiring or occupation is to continue, shall be deemed and held valid until the first day of May next after the time when the possession under such agreement shall commence; and that unless it is otherwise agreed upon between the parties to such agreement, the rent under such agreement, or the compensation to the landlord, for the use and occupation of the premises, shall be payable on the usual quarter days for the payment of rent in the said city, and be recoverable accordingly. *And further*, That no agreement by parole, and not in writing, for the letting or hiring of any lands or tenements in the city of New-York, shall be valid or binding in law, for any longer period than one year from the making thereof.

Parol agreements not valid, except for one year.

False swearing perjury.

V. *And be it further enacted*, That if any person who shall be sworn to any matter by virtue of this act, shall in such matter swear falsely, such person shall, on conviction thereof, be subject to all the pains and penalties of perjury.

Rights reserved and fees of officers.

VI. *And be it further enacted*, That nothing in this act contained, shall be construed to impair the rights of any landlord or lessor, under existing laws; and that the magistrates and officers shall be entitled to the like fees, under this act, as for similar services under any other act or acts, to be paid by the party against whom the decision shall be pronounced, and recovered of him by the other party in an action of debt.

Right to pursue goods taken away to defraud landlord.

VII. *And be it further enacted*, That it shall and may be lawful for any lessor or landlord, or any person or persons by him for that purpose lawfully empowered, at any time within the space of thirty days next after the rent shall have become due and payable, to pursue, take and seize, all such goods or chattels of such tenant, or lessee, as a distress for the arrears of rent, as may have been conveyed away or carried from off the demised premises, and that so much of the thirteenth section of the act "concerning distresses, rents, and the renewal of leases," as is repugnant hereto, be, and the same is hereby repealed.

Special damages against tenants holding over, &c.

VIII. *And be it further enacted*, That any tenant or tenants, who shall hold over the possession of any lands, tenements or hereditaments, against the provisions of the twenty-first section of the said act "concerning distresses, rents, and the renewal of leases," in addition to the double rent thereby given, shall be liable to pay and remunerate the landlord or lessor for all special damages whatsoever, to which such landlord or les-

sor may be subjected, by reason of such holding over, to be recovered in like manner, as in and by the said act is provided.

When landlord may resume possession of vacant premises, &c.

IX. *And be it further enacted*, That if the tenant or lessee of any lands or tenements shall take the benefit of any insolvent act, or shall abscond and leave the premises vacant, the landlord or lessor shall, in either such case, and on due proof thereof, be entitled to the like proceedings, for obtaining the possession of the said premises as are provided in the first section of this act, unless the tenant or lessee shall give such security to the landlord or lessor of the said premises, for the payment of the rent thereof, as the same shall become due, as shall be satisfactory to the magistrate to whom application shall be made for such proceedings as aforesaid.

Certain act repealed.

X. *And be it further enacted*, That the act, entitled "An act to amend an act, entitled 'an act concerning distresses, rents, and the renewal of leases', passed April 5th, 1813, and for other purposes," passed April 21st, 1818, be, and the same is hereby repealed.

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